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Recommended Citation

Barkow, Rachel E. and Huber, Peter W. () "A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers," *University of Chicago Legal Forum*: Vol. 2000: Iss. 1, Article 4.
Available at: <http://chicagounbound.uchicago.edu/uclf/vol2000/iss1/4>

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A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers

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Currently, most telecommunications mergers require approval of both the Federal Communications Commission ("FCC") and the Department of Justice ("DOJ").¹ Although the agencies' respective statutory mandates differ—the FCC reviews mergers under the Communications Act's broad "public interest" standard and DOJ follows the competition-based standard of the federal antitrust laws—the agencies themselves both claim to focus their review on what they believe to be the merger's effect on competition.² That is, the FCC sees its role as that of a shadow DOJ, analyzing mergers under the public interest standard to determine how they will influence competition in the telecommunications industry. Despite this claimed overlap, their approaches—and, consequently, frequently their outcomes—are markedly different.

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¹ The Federal Trade Commission ("FTC") also has authority to review mergers and acquisitions under sections 1 and 6 of the FTC Act, 15 USC §§ 41, 46 (1994). The Clayton Act, however, strips the FTC of its jurisdiction to review mergers and acquisitions between common carriers and instead vests that authority in the FCC. See 15 USC § 21(a) (1994). The FTC retains authority over cable and mass media mergers, though, in practice, the FTC and DOJ have formalized a "clearance" process by which the agencies voluntarily divide authority over a particular merger. See James R. Weiss and Martin L. Stern, *Serving Two Masters: Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 *CommLaw Conspectus* 195, 198 (1998).

² Weiss and Stern, 6 *CommLaw Conspectus* at 206 ("In analyzing whether a particular merger raises any competitive concerns, the FCC and DOJ are performing essentially the same tasks.") (cited in note 1).

This Article explores the underpinnings of these differences. As we explain, the core source of the disparity is the agencies' generally differing views of how best to promote competition. The Commission starts with a bias toward regulation whereas the Department tends to favor the free market. From this fundamental distinction in agency mindset flows a variety of consequences. This Article will consider how these different visions influence both the substantive and procedural choices of the two agencies. By comparing the FCC's methodology and bias with that of the Department, we gain a more coherent understanding of how the procedural preferences of an agency influence substantive outcomes and how an agency's substantive agenda influences its choice of procedure. While we consider both agencies, our emphasis is on how the FCC's deeply imbedded preference for regulation influences its choice of a procedural model and how, in turn, that model impedes the Telecommunications Act of 1996's goal of promoting competition and deregulation. We will also explore the dangers of the Commission's approach as a more general matter of antitrust and administrative law.³

This Article begins in Part I by describing the substantive and procedural approaches of the Commission and the Department to telecommunications mergers. Part II explores the source of the variation in treatment. Specifically, we explain how the agencies' differing views of markets and regulation influence their substantive merger standards, and we offer an evaluation of those substantive policies. In Part III, we consider how the agencies' views of governance intersect with their procedural philosophies. We focus in particular on how the FCC uses procedure to achieve its substantive goals. We then discuss the consequences of the procedural model pursued by the Commission.

I. FCC AND DOJ DUAL REVIEW OF TELECOMMUNICATIONS MERGERS

Federal review of telecommunications mergers provides the ideal opportunity to analyze two dissimilar substantive and procedural approaches to mergers. Although DOJ and the FCC both place great weight on "competitive effects" in evaluating mergers, they give different content to that standard. In this section, we begin by explaining the origins and consequences of dual review

³ Our focus is on the FCC because, as we explain, its approach—far more than the Department's—represents a significant departure from traditional models of substantive antitrust policy and administrative procedure.

by both the Department and the Commission. We then describe the respective substantive approaches of the two agencies.

A. The Origins and Consequences of Dual Review

Dual review of the same issue by two federal bodies is rare. It is, after all, highly inefficient to have two decision-makers wrestle with the same issue when one can do the job alone. Multiple layers of review result in delay, uncertainty, and wasted resources.⁴ For example, a merging telecommunications party must respond to frequently overlapping requests for information from both DOJ and the FCC.⁵ To appease the FCC, a merging party must file an application for approval (which includes a public interest statement); often, the merging party must then respond to hundreds of pages of comments, provide additional documents, meet with the Commission staff, and spend months negotiating conditions.⁶ Frequently, the FCC's requests follow on the heels of DOJ's investigation, which is also likely to require the production of thousands of pages of documents and countless hours of corporate executives' time, as they must respond to various discovery requests and perhaps depositions. Both processes, of course, involve substantial legal fees.⁷ And at the end of the day, the FCC extracts little information that has not already been produced for the Department of Justice, and vice versa.

Moreover, the dual review means that a merger between telecommunications companies will take far longer than mergers generally. The average merger takes two to four months to con-

⁴ See William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 Emory L J 715, 754 (1989) ("Because the industry is subject to two sets of antitrust laws, regulatory costs to the government and to the industry have increased.").

⁵ The agencies often conduct their reviews simultaneously, though DOJ tends to finish long before the FCC.

⁶ It is difficult to predict which mergers the FCC will subject to lengthier reviews and which it will give relatively cursory treatment. One of the FCC commissioners testified before Congress that "[t]he Commission annually approves tens of thousands of license transfers without any scrutiny or comment; others receive minimal review, and a select few are subjected to intense regulatory scrutiny Unfortunately, there is no established Commission standard for distinguishing between the license transfers that trigger extensive analysis by the full Commission and those that do not." Testimony of FCC Commissioner Harold W. Furchtgott-Roth Before the House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, on the Telecommunications Merger Review Act of 2000, 4 (Mar 14, 2000), <http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html> (visited May 6, 2000).

⁷ Weiss and Stern, 6 Commlaw Conspectus at 206 (cited in note 1).

clude.⁸ Telecommunications mergers, however, take between nine and twelve months to conclude.⁹ The Bell Atlantic/NYNEX merger, for example, did not receive final regulatory approval from the Commission until fifteen months after the parties filed their application.¹⁰ MCI and WorldCom filed their petitions for review with the Commission on October 1, 1997, and the Commission did not give its approval until September 14, 1998. The Commission took eight months to approve the union of SBC and Southern New England Telecommunications.¹¹

No merging company should be subject to such long delays; but it is especially troublesome for telecommunications carriers to

⁸ See Thomas A. Swett, Comment, *Merger Terminations After Bell Atlantic: Applying a Liquidated Damages Analysis to Termination Fee Provisions*, 70 U Colo L Rev 341, 371 (1999).

⁹ Erin M. Reilly, *The Telecommunications Industry in 1993: The Year of the Merger*, 2 Commlaw Conspectus 95, 108 (1994). As FCC Commissioner Furchtgott-Roth has pointed out, "[t]he FCC seems always to be last among countless agencies to offer an opinion." Separate Statement of Commissioner Harold Furchtgott-Roth in *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp, Transferor, to SBC Communications Inc, Transferee*, Memorandum Opinion and Order, 13 FCC Rec 21292, 21322 (1998) ("SNET/SBC"); see also Separate Statement of Commissioner Harold Furchtgott-Roth in *Application of WorldCom, Inc and MCI Communications Corp for Transfer of Control of MCI Communications Corp to WorldCom, Inc*, 13 FCC Rec 18025, 18158 (1998) ("MCI/WorldCom"). In addition to FCC and DOJ review, merging telecommunications companies must also seek approval from relevant state agencies.

The FCC has recently taken steps in an effort to streamline its review of mergers. See Issues Memorandum for March 1, 2000 Transaction Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers, <<http://www.fcc.gov/transaction/issuesmemo.html>> (visited Oct 23, 2000). However, even under the Commission's proposed timeline, the Commission would still need six months to resolve "complex mergers." See Proposed Timeline for Consideration of Applications Relating to Complex Mergers, <<http://www.fcc.gov/transaction/timeline.html>> (visited Oct 23, 2000). The Commission's Chairman recently testified before Congress that a House bill, which requires final agency action within sixty or ninety days from the filing of an application, does not allow enough time for final agency action. See Statement of William E. Kennard, Chairman, Federal Communications Commission before the House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection on the Telecommunications Merger Review Act of 2000 (Mar 14, 2000), <<http://infoserver.fcc.gov/Speeches/Kennard/Statements/2000/stwek021.html>> (visited Oct 23, 2000).

¹⁰ *Bell Atlantic-NYNEX Merger Gets Go-Ahead Clearance from FCC*, Wireless Messaging Rep 16 (Aug 19, 1997).

¹¹ These long delays have prompted both Houses of Congress to consider legislation that would limit the amount of time during which the FCC could review a merger. See Antitrust Merger Review Act, S 467 § 2(b)(1)-(2) 106th Cong, 1st Sess (Feb 25, 1999) in 145 Cong Rec S2432-34 (Mar 8, 1999); Telecommunications Merger Review Act of 2000, HR 4019 § 3(a)(1) 106th Cong, 2d Sess (Mar 16, 2000), available on Westlaw at 1999 Cong US HR 4019. The Senate bill was reported to the full Senate by the Senate Committee on the Judiciary without a written report and has been placed on the Senate Legislative Calendar. See 145 Cong Rec S8084 (July 1, 1999). The House version has been approved by a voice vote of the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce. See *Bill To Restrict FCC's Oversight of Mergers Advances in House*, CQ Weekly 1617 (July 1, 2000).

experience an extensive lag time before their application is cleared. Telecommunications is a dynamic industry where firms can extract enormous profits from being the first-mover in a particular segment of the industry and establishing themselves as the leading provider of a particular service. Congress expected, moreover, the convergence of technology and therefore of telecommunications companies. Congress passed the Telecommunications Act of 1996 to promote competition in local markets and to encourage a meeting of technologies that would provide consumers with an array of telecommunications options. Thus, Congress eliminated most line-of-business restrictions that were imposed when the Bell system was broken up in 1982.¹² The 1996 Act "envisions a world in which all segments of the electronic communications industries are open to competition . . . and indeed converge and blur recognition."¹³

Why, then, in this of all industries would Congress impose a regime that leads to long delays that risk undermining the very reasons for a merger? One possible answer is that the two agencies reviewing mergers possess expertise in separate areas and thus review the mergers with different policy goals in mind. As Joel Klein, the former chief of DOJ's Antitrust Division, has observed, "while the Justice Department and the Commission have shared jurisdiction in this area, our statutory responsibilities and missions are somewhat different."¹⁴ To be sure, as discussed in

¹² In 1982, an antitrust consent decree (known as the "Modified Final Judgment" or "MFJ") signaled the end of the Bell System monopoly. See *United States v AT&T*, 552 F Supp 131 (D DC 1982), aff'd as *Maryland v United States*, 460 US 1001 (1983). The decree dissected the company's two major components, local exchange service and long distance service. The former became the seven Regional Bell Operating Companies (RBOCs or BOCs) and the latter AT&T. The RBOCs were viewed as natural monopolies, so the architects of the decree imposed line-of-business restrictions on the newly-formed companies to prevent the reemergence of a company that would have "both the ability and the incentive" to thwart competition in a competitive market by leveraging its monopoly power in the local exchange market. *Id.* at 187 (citation omitted). Judge Harold Greene, who presided over the Modified Final Judgment, forbade the RBOCs from providing long-distance service (also known as interexchange service), supplying information services, and manufacturing telecommunications and customer premises equipment. *Id.* at 188-91. Congress rejected this paradigm with the 1996 Act and eliminated the quarantines that prevented convergence. See, for example, S Rep No 104-23, 104th Cong 1st Sess at 5-6 (1995) (noting, among other things, that the 1996 Act "reforms the regulatory process to allow competition for local telephone service by cable, wireless, long distance and satellite companies, and electric utilities, as well as other entities," "permits telephone companies to enter cable," and "establishes a process under which the BOCs may apply to enter the inter-LATA market").

¹³ Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum L Rev 1323, 1405 (1998).

¹⁴ Joel I. Klein, Address to the Federal Energy Regulatory Commission, *Making the Transition from Regulation to Competition: Thinking About Merger Policy During the*

greater detail below,¹⁵ the FCC frequently uses merger reviews as forums for advancing its regulatory agenda under the Communications Act. The Department, in contrast, tends to see its role as more limited: it is an antitrust enforcement agency without the same type of substantive agenda.¹⁶ Thus, to the extent that the two agencies serve different and socially valuable policing functions, the negative consequences of dual review may be justified.

It is far from clear, however, that the agencies themselves believe that they are serving different purposes. Despite the different statutory mandates, the agencies' respective analyses overlap substantially. Both agencies focus on what they believe to be the competitive effects of a merger. Specifically, the Commission believes that the public interest is served by promoting competition.¹⁷ To that end, the Commission even borrows from the Department's merger guidelines in conducting its analysis.¹⁸ Indeed, the Commission will consider, as part of its Communications Act review, "whether the transfer may substantially lessen competition or tend to create a monopoly"¹⁹—the hallmark standard from the Clayton Act. Thus, while it might make sense to give the FCC authority to analyze a transaction for its effect on telecommunications policy, it is far from clear why the FCC should have the power to conduct a competitive effects analysis when the Department is already charged with the same task.²⁰

Process of Electric Power Restructuring (Jan 21, 1998), available online at <<http://www.usdoj.gov/atr/public/speeches/1332.pdf>> (visited Oct 6, 2000).

¹⁵ See Part III C 1.

¹⁶ Effects of Consolidation on the State of Competition in the Telecommunications Industry, Hearing before the House Committee on the Judiciary, HR Rep No 105-118, 105th Cong, 2d Sess 9 (1998) (statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, DOJ). The statement is also available at 1998 WL 12761639 (June 24, 1998).

¹⁷ See *Applications of NYNEX Corp and Bell Atlantic Corp for Consent to Transfer Control of NYNEX Corp*, Memorandum Opinion and Order, 12 FCC Rec 19985, 19987 ¶ 2 (1997) ("BA/NYNEX").

¹⁸ See *id* at 20008 ¶ 37.

¹⁹ *Applications of AirTouch Communications, Inc and Vodafone Group, PLC for Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rec 9430, 9435-36 ¶ 11 (1999) ("AirTouch/Vodafone").

²⁰ It may be, in fact, that the Commission does not have its claimed authority under the Communications Act. The Commission asserts that its authority to review mergers qua mergers derives from §§ 214(a) and 310(d) of the Communications Act. See *id*. These provisions address license transfers and license acquisitions, not mergers. There is nothing in the language of either provision to suggest that the Commission may use these statutory wedges to review the entire transaction between parties above and beyond the particular lines being acquired and the particular station licenses being transferred. The express authority Congress vested in the Commission to review mergers under the Clayton Act casts further doubt on the Commission's reading. Under existing law, the Commission has concurrent jurisdiction with the Department of Justice under §§ 7 and 11 of

This dual review is especially dubious when it appears that the agencies seem to act at cross-purposes.²¹ As we discuss in the following two sections, the Commission seems to believe that competition is best promoted through regulatory oversight, whereas the Department tends to trust market forces to bring about the optimum outcome.

B. DOJ Merger Review

The Antitrust Division of the Department of Justice operates under antitrust laws that are, in many ways, paradigms of the common-law adjudication model. When Senator Sherman described the bill that became the Sherman Act, he explained that the bill

the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmission of energy" where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 USC §§ 18, 21(a) (1994 & Supp 1998). If the FCC possesses broad authority to review mergers for their competitive effects under the Communications Act, there would seem to be little—if any—need for this Clayton Act authority. The Commission's interpretation of its authority under the Communications Act, then, renders its power under the Clayton Act meaningless: the Clayton Act gives it no authority that it does not already possess under the Communications Act and its broader "public interest" test. It is, of course, an established interpretive canon that a reading of a statute that renders another statutory provision meaningless should be avoided. See, for example, *Ratzlaf v United States*, 510 US 135, 140–41 (1994).

At least one member of the current Commission believes that the Commission's broad review of mergers is an unauthorized power grab. See Separate Statement of Commissioner Harold Furchtgott-Roth in *SNET/SBC*, 13 FCC Rec at 21322 & n 137. See also Letter from Commissioner Furchtgott-Roth to Edward E. Whitacre, Jr., Apr 5, 1999 ("Furchtgott/Whitacre Letter") [on file with U Chi Legal F] at 2 ("[W]e cannot impose new substantive burdens on companies simply in the name of 'competition'; rather, we should be able to point to a section of the Act indicating that Congress at least envisioned the imposition of the duties at issue."). Another commissioner has expressed doubt about whether the "marginal value of full-blown merger review by the Commission is justified by its cost in time and resources." Telecommunications Reports 27 (May 31, 1999) (quoting Commissioner Michael K. Powell).

These criticisms have not gone unnoticed; as discussed in note 11, Congress is considering legislation aimed at curbing the Commission's claimed authority. Whatever the ultimate fate of the Commission's authority to review mergers, its past practice enables us to compare two general approaches to mergers, the FCC's and DOJ's.

²¹ A recent report by the International Competition Policy Advisory Committee (a bipartisan panel of former regulators, academics, and representatives of industry and labor) concludes that the "overlapping review in the United States is more often than not a defect of the U.S. system and that a more rationale or sensible system would be to give exclusive jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to DOJ and FTC." International Competition Policy Advisory Committee, *Multijurisdictional Mergers: Rationalizing the Merger Review Process Through Targeted Reform* (2000), <<http://www.usdoj.gov/atr/icpac/chapter3.htm>> (visited May 7, 2000). See also James V. Grimaldi, *Antitrust Review Changes Urged*, Wash Post E3 (Feb 29, 2000).

[did] not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of the common law and human experience that is aimed at by this bill, and not the lawful and useful combination.²²

But because “it is difficult to define in legal language the precise line between lawful and unlawful combinations,”²³ the Sherman Act left it to DOJ and the courts to wrestle with the facts of particular cases and to develop a common law of antitrust law. The Clayton Act contains a similarly wide-open standard for the Department and courts to apply: they are to determine whether a merger’s effect “may be substantially to lessen competition.”²⁴ Congress had a guiding principle in mind: competition is the paramount objective and government should interfere when necessary to further that objective. As one observer has put it, Congress passed the antitrust laws with the belief that

[t]he government’s natural role in the system of free private enterprise was that of a patrolman policing the highways of commerce. It is the duty of the modern patrolman to keep the road open for all and everyone and to prevent highway robbery, speeding, the running of red lights and other violations that will endanger and hence, in the end, slow down the overall movement of traffic. . . . Government intervention should remove obstacles to the free flow of commerce, not itself become an additional obstacle.²⁵

A former chief of the Antitrust Division reiterates that objective by likening the Department’s role to a referee: “If you don’t let the players play—or, in market terms, if you try to over-regulate the

²² 21 Cong Rec 2457 (Mar 21, 1890) (statement of Senator Sherman).

²³ Id.

²⁴ 15 USC § 18 (1994).

²⁵ Hans B. Thorelli, *The Federal Antitrust Policy* 226–27 (Johns Hopkins 1954). See also Joel I. Klein, *Address to the New York State Bar Association: The Importance of Antitrust Enforcement in the New Economy* 12 (Jan 29, 1998), available online at <http://www.usdoj.gov/atr/public/speeches/speech_klein.htm> (visited Jan 22, 2000), quoting Thurman Arnold, head of DOJ’s Antitrust Division from 1939–43 (“The maintenance of a free market is as much a matter of constant policing as the flow of traffic on a busy intersection. It does not stay orderly by trusting the good intentions of drivers or by preaching to them. It is a simple problem of policing, but a continuous one.”).

competitive process—you can ruin the game.”²⁶ The role of the Department²⁷ is therefore to interfere only as is necessary to keep markets free and competitive.²⁸

It is within this framework that the Department of Justice evaluates telecommunications mergers. The Department analyzes telecommunications mergers as it does most mergers: under § 7 of the Clayton Act, which prohibits acquisitions “where in any line of commerce or in any activity affecting commerce . . . in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”²⁹ Enforcement under the Clayton Act, by its terms, is prospective and predictive: it is concerned with competitive effects that *may* occur, and it allows the Department to challenge a merger before it is consummated.³⁰

In large transactions, which include most telecommunications mergers, the parties must file for pre-approval with the Department under the Hart-Scott-Rodino Antitrust Improvement Act of 1976.³¹ The Hart-Scott-Rodino Act requires the parties to file “documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission (“FTC”) and the Assistant Attorney General to determine whether such an acquisition may, if consummated, violate the antitrust laws.”³² Parties must then wait a certain specified period before the deal may be consummated. During this waiting period, the Department investigates the

²⁶ Klein, *Importance of Antitrust Enforcement* at 12 (cited in note 25).

²⁷ This same objective would apply to other agencies that have enforcement authority under the Clayton Act.

²⁸ See Irwin M. Stelzer, *Why Janet Reno v. Bill Gates is Good for Capitalism*, *The Weekly Standard* 25 (Dec 1 1997) (“Friends of the free market should not forget that the antitrust laws deserve their veneration because they keep government’s role as a regulator to a bare minimum.”).

²⁹ 15 USC § 18. The Department also has at its disposal §§ 1 and 2 of the Sherman Act, which, respectively, prohibit combinations in restraint of trade and actual or attempted monopolization. See 15 USC §§ 1, 2, 18 (1994 & Supp 1998). See also *United States v. Penn-Olin Chemical Co.*, 378 US 158, 170–71 (1964); ABA Antitrust Section, *Antitrust Law Developments* 275–76 n 4 (3d ed 1992). Professor Areeda has noted that “it would be surprising, to say the least, to find that the Sherman Act prohibits a merger whose effects are insufficient to satisfy the Clayton Act.” Philip Areeda and Donald F. Turner, 5 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1145b at 257 (Little, Brown 1980).

³⁰ Klein, *Making the Transition from Regulation to Competition* at 7 (cited in note 14) (“For the most part, merger enforcement under the Clayton Act is prospective: that is to say, we generally challenge mergers before they are consummated.”).

³¹ Pub L No 94-435, Title II, § 201, 90 Stat 1390 (1976), codified at 15 USC § 18(a).

³² 15 USC § 18(a)(d)(1).

merger. If necessary, the Department will reach a remedial agreement with the parties, or file suit to block the merger.³³

Because Congress believed that government should interfere only when necessary to protect competition, the presumptions in the Clayton Act favor the free market. That is, a transaction may go forward unless the Department establishes by a preponderance of the evidence that the Clayton Act standard is satisfied. The Department must satisfy a district court that it has met its burden with evidence admissible in a court of law.³⁴

When the Department proceeds under § 7, it is concerned with probabilities—not certainties or “ephemeral possibilities.”³⁵ In determining the probable effects of a merger, the Department first defines the relevant product and geographic markets,³⁶ and then evaluates the impact of the acquisition on competition in those markets.³⁷ In determining whether a particular merger violates the antitrust laws, the Department follows the 1992 Horizontal Merger Guidelines to analyze horizontal mergers³⁸ and the 1984 Justice Department Merger Guidelines to evaluate non-horizontal mergers.³⁹ Although the Guidelines do not contain

³³ Klein, *Making the Transition from Regulation to Competition* at 7 (cited in note 14).

³⁴ See *United States v Baker Hughes, Inc.*, 908 F2d 981, 983 (DC Cir 1990) (Thomas) (“[T]he ultimate burden of persuasion . . . remains with the government at all times.”).

³⁵ See *Brown Shoe Co v United States*, 370 US 294, 323 (1962) (“Congress used the words ‘may be substantially to lessen competition’ to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a possible anticompetitive effect were proscribed by this Act.”) (citation omitted).

³⁶ See ABA Antitrust Section, *Antitrust Law Developments* at 282–98 (cited in note 29).

³⁷ *Id.* at 298–99.

³⁸ The basic analysis of horizontal mergers under the 1992 Guidelines is as follows:

First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail.

United States Department of Justice Antitrust Division and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed Reg 41552 § 0.2 (1992), rev 4 Trade Reg Rep § 13104 (1997) (“Horizontal Merger Guidelines”).

³⁹ The Department is unlikely to challenge vertical mergers under the 1984 Guidelines unless the Herfindahl-Hirshman Index (computed by summing the squares of the market shares of every firm in the market) in the upstream market is more than 1800 and

hard-and-fast rules, they do provide various tests and presumptive thresholds that inform the merging parties in advance what factors are critical to the Department's analysis. The Department is concerned with factors such as market concentration, ease of entry, and potential efficiencies.⁴⁰

The Department tends not to make new policies in the course of its enforcement adjudications.⁴¹ Rather, the Department judges each merger "on its own particular facts," applying principles of competition that have already been announced.⁴² Parties, then, have some ex ante guidance on which aspects of their transaction will concern the Department.

Generally, the Department's approach to remedies is similarly predictable. If the Department believes that a merger will substantially lessen competition, it typically seeks to negotiate a consent agreement with the parties.⁴³ The purpose of a decree "is to restore the market to roughly the competitive posture it would have had but for the merger."⁴⁴ Usually, the decrees are structural, requiring divestiture of assets, not regulation of day-to-day operations.⁴⁵

For example, the Department reached a consent agreement with SBC and Ameritech that required the companies to divest certain cellular assets in areas in which the companies had overlapping cellular wireless licenses.⁴⁶ Otherwise, the Department gave the SBC/Ameritech merger full clearance. To take another

"a large percentage of the upstream market would be sold through vertically-integrated retail outlets after the merger." United States Dept of Justice Antitrust Division and Federal Trade Commission, *1984 Merger Guidelines*, 49 Fed Reg 26824 § 4.221 (1984), rev. 2 Trade Reg Rep ¶ 4490 (1986).

⁴⁰ HR Rep No 105-118 at 9 (statement of Joel Klein) (cited in note 16).

⁴¹ This is not, of course, true in every case. A previous chief of the Antitrust Division has noted that the Department seeks to clarify its views "through a variety of vehicles: in speeches, in formal guidelines, in competitive impact statements, and in court filings." Klein, *Importance of Antitrust Enforcement* at 7 (cited in note 25). He further added that he was especially interested in "re-engaging the federal courts" "in pursuing new doctrinal issues." *Id.*

⁴² HR Rep No 105-118 at 8 (statement of Joel Klein) (cited in note 16).

⁴³ If the Department pursues this option, it first publishes a Competitive Impact Statement, which explains the merger's allegedly anticompetitive effects. The Statement also describes how the proposed consent decree would remedy those effects. The Department opens up the Statement to comment, and if necessary, has hearings before a court. The decree is then entered when a court concludes that the decree is in the public interest. See 15 USC § 5 (1994); Klein, *Making the Transition from Regulation to Competition* at 8 (cited in note 14).

⁴⁴ Klein, *Making the Transition from Regulation to Competition* at 8 (cited in note 14).

⁴⁵ *Id.*

⁴⁶ See *United States v SBC Communications Inc*, 1999 US Dist Lexis 16789, *9-11 (D DC).

example, the Department approved the Bell Atlantic union with NYNEX with no strings attached. After “a year-long analysis of millions of documents—including, significantly, the non-public business plans of many of the affected players—as well as lots of deposition testimony, interviews, expert commentary, and advice,” the Department did not challenge the merger.⁴⁷ Thus, “even though it was one of the largest mergers in our Nation’s history,” the Department did not let size alone sway its determination.⁴⁸ Rather, the Department relied on the fact that the merger “was likely to benefit consumers in that the resulting efficiencies would lead to improved services.”⁴⁹ As discussed in the next section, the FCC found both of these unions much more troublesome under its view of their “competitive effects.”

C. FCC Merger Review

The Commission is perhaps the paradigmatic New Deal agency.⁵⁰ It addresses perceived problems with a broad brush, generally passing sweeping regulations to govern every last anticipated problem. When additional problems arise, it begins procedures to pass additional regulations, and so on.

The Commission’s authority is not limited to rulemakings, however. Like the Department, it has adjudicatory powers.⁵¹ In particular, the Commission holds court over wireless and wireline licenses. Their issuance, renewal, and transfer is governed by the broad “public interest” standard—a paradigmatic common-law benchmark designed to allow the agency to proceed on a case-by-case basis. The Commission’s review of mergers takes place within license adjudications and under the public interest standard. As we discuss in more detail, the Commission’s substantive review of mergers is far different from DOJ’s.

⁴⁷ Klein, *Making the Transition from Regulation to Competition* at 5 (cited in note 14).

⁴⁸ Klein, *Importance of Antitrust Enforcement* at 13 (cited in note 25).

⁴⁹ *Id.* at 13–14.

⁵⁰ See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints of Agency Discretion*, 51 Admin L Rev 429, 433–34 (1999) (“Broad statutory delegations of power to an agency to regulate a general area of the economy, characteristic of much legislation adopted under the New Deal belief in agency expertise, impose few ex ante constraints on the agency.”).

⁵¹ The FCC reviews mergers in licensing proceedings, which the Administrative Procedure Act (“APA”) includes under the adjudicatory rubric. The APA defines “adjudication” as “agency process for the formulation of an order.” 5 USC § 551(7) (1994). Under the APA, “order” includes “licensing.” *Id.* at § 551(6). As we discuss, however, the Commission’s licensing proceedings in the merger context bear a striking resemblance to rulemakings in many instances.

1. The Commission's authority under the Clayton Act.

Under existing law, the Commission has concurrent jurisdiction with DOJ under Sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmission of energy" where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."⁵² In practice, however, the FCC consistently declines to proceed under its Clayton Act authority.⁵³ In reviewing mergers, the Commission invariably notes this authority, then states that it need not rely upon the Clayton Act because the Commission's review under the Communications Act is sufficient.⁵⁴

It is easy to see why the Commission prefers reviewing mergers under the Communications Act. As discussed in greater detail below, the "public interest" standard gives it virtually limitless discretion to approve, disapprove, or condition a merger based on whatever factors it deems important at the time. Pursuant to this broad power, the Commission can disapprove or place conditions on a merger even if the Department of Justice has already cleared the transaction outright. And, under the Communications Act, the merging parties bear the burden of demonstrating that the license transfer is in the public interest. The Commission itself determines whether that burden has been satisfied, relying on any evidence in the public record. A reviewing court will uphold the Commission's factual findings as long as they are supported by substantial evidence—a notoriously lax standard.⁵⁵ In

⁵² 15 USC §§ 18, 21(a).

⁵³ Weiss and Stern, 6 *Commlaw Conspectus* at 198 (cited in note 1) ("[W]e have not found a case in the last forty years where the Commission proceeded under the Clayton Act.").

⁵⁴ See, for example, *MCI/WorldCom*, 13 FCC Rec at 18032-33 ¶ 12; *The Merger of MCI Communications Corp and British Telecommunications plc*, Memorandum Opinion and Order, 12 FCC Rec 15351, 15359 ¶ 28 (1997) ("BT/MCI II"); *BA/NYNEX*, 12 FCC Rec at 20006 ¶ 35; *Application of Pacific Telesis Group and SBC Communications, Inc., for Consent to Transfer Control of Pacific Telesis Group*, Memorandum Opinion and Order, 12 FCC Rec 2624, 2631 ¶ 13 (1997) ("SBC/PacTel"); *AirTouch/Vodafone*, 14 FCC Rec at 9434 n 21 (refusing "to exercise its statutory authority under the Clayton Act in this case because the Commission's jurisdiction under the Communications Act is sufficient to address all questions regarding the competitive effects of the proposed transfer, including the issue of whether the transfer may substantially lessen competition or tend to create a monopoly"). The D.C. Circuit has held that the FCC has discretion whether to assert its Clayton Act authority. See *United States v FCC*, 652 F2d 72, 82-83 (DC Cir 1980).

⁵⁵ See, for example, *Consolo v Federal Maritime Commission*, 383 US 607, 620 (1966) ("This standard is something less than the weight of the evidence, and the possibility of

contrast, the Commission would bear the burden of proving an antitrust violation under the Clayton Act and would have to rely upon evidence admissible in a court of law.⁵⁶ Thus, the Commission has considerably more procedural and substantive flexibility when it operates under the Communications Act instead of the Clayton Act.

2. The Commission's review under the public interest standard.

The two critical license provisions in the Communications Act that apply to telecommunications mergers are §§ 214(a) and 310(d). The benchmark in § 214(a) for license transfers and acquisitions is "the present or future public convenience and necessity."⁵⁷ The test in § 310(d) is the "public interest, convenience, and necessity."⁵⁸ The "public interest"⁵⁹ is, to put it mildly, an amorphous standard that allows the Commission to consider virtually anything.⁶⁰ As the Supreme Court has said, the "standard no doubt leaves wide discretion and calls for imaginative interpretation."⁶¹ It is "[n]ot a standard that lends itself to application with exactitude."⁶² And, for its part, the Commission has done little to rein itself in.⁶³ Over the years, the Commission has im-

drawing inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); see also *id.* at 619-21 (elaborating on this standard).

⁵⁶ A former chief of the Antitrust Division recently suggested amending the Clayton Act to place the burden on merging parties in situations where markets are making the transition from regulation to competition. See Klein, *Making the Transition from Regulation to Competition* at 13 (cited in note 14) ("The basic notion behind this approach is that any uncertainties associated with the transition period should not provide a legal license to merge but rather may be a good reason for increased skepticism about certain combinations.").

⁵⁷ 47 USC § 214(a) (1994).

⁵⁸ 47 USC § 310(d) (1994).

⁵⁹ Although the language employed in §§ 214(a) and 310(d) is not identical, the Supreme Court has stated that "[t]he phrase 'public convenience and necessity' no less than the phrase 'public interest' must be given a scope consistent with the broad purpose" of the statute of which it is a part. *Interstate Commerce Commission v. Railway Labor Executives Association*, 315 US 373, 376 (1942). Thus, we use the term "public interest" as a shorthand for both standards.

⁶⁰ As Judge Friendly has observed, it "[c]ertainly would be better if Congress could be somewhat more specific at the outset." Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 13 (Harvard 1962).

⁶¹ *FCC v. RCA Communications, Inc.*, 346 US 86, 90 (1953).

⁶² *Id.*

⁶³ Mike Harrington, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices,"* 38 BC L Rev 497, 506 (1997) (pointing out that the Commission "has consistently rejected calls to adopt concrete standards for defining the public interest").

bued the term with a variety of factors for consideration—basically, whatever the Commission deems important at the time.⁶⁴

Vague though it may be, the Supreme Court has upheld the “public interest” standard outside of the merger review context and allowed the Commission broad leeway under which to operate.⁶⁵ A Commission decision that a license transfer is in the public interest is entitled to “substantial judicial deference.”⁶⁶ “So long as ‘the FCC’s action resulted from consideration of the relevant factors’ and the agency has not ‘succumbed to a clear error of judgment,’ its decision must be upheld.”⁶⁷

The latest incarnation of the Commission’s public interest test under Sections 214 and 310 focuses on what the Commission believes to be “competitive effects.” The Commission considered the competitive implications of a merger as a factor in the public interest inquiry long before the 1996 Act.⁶⁸ However, since the

⁶⁴ As Judge Friendly observed, the FCC uses “an arbitrary set of criteria whose application . . . is shaped to suit the cases of the moment.” Friendly, *Federal Administrative Agencies* at 54 (cited in note 60). For example, in the broadcast license context, the Commission has considered local ownership, diversity of ownership, proposed programming, broadcast experience, the character and financial status of the applicants, and whether there would be a concentration of media control. See Stephen Breyer, *Regulation and Its Reform* 73, 78–79 (Harvard 1982); David L. Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 Harv L Rev 921, 943 (1965) (noting that the FCC, among other agencies, has “often” failed to use regulations “to clarify [its] view on the significance of competitive or other key factors in the performance of their functions”).

⁶⁵ See *FCC v RCA Communications, Inc.*, 346 US at 91 (“Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vague, penumbral bounds expressed by the standard of ‘public interest’”); *Rainbow Broadcasting Co v FCC*, 949 F2d 405, 410 (DC Cir 1991) (“[T]he Supreme Court has validated the broad parameters within which the FCC may further its view of the public interest without interference from the courts. The Supreme Court has held that Congress delegated to the FCC the task of making the initial determination of how its policies may best serve the public.”).

⁶⁶ *FCC v WNCN Listeners Guild*, 450 US 582, 596 (1981).

⁶⁷ *SBC Communications Inc v FCC*, 56 F3d 1484, 1490 (DC Cir 1995).

⁶⁸ See, for example, *Craig O. McCaw & AT&T, Application for Consent to the Transfer of Control*, Memorandum Opinion and Order, 9 FCC Rec 5836, 5849 ¶ 20 (1994), reconsideration denied on other grounds, 10 FCC Rec 11786 (1995), *affd as SBC Communications Inc v FCC*, 56 F3d 1484 (DC Cir 1995); *South Central Bell Phone Co and Southern Bell Co, Application To Merge*, Memorandum Opinion and Order, 6 FCC Rec 7136 ¶ 13, 7138 ¶ 18 (1991) (conditioning its finding that the acquisition is in the public interest on, among other things, the promotion of “competition”); *The Mountain States Telephone and Telegraph Co, Northwestern Bell Telephone Co, and Pacific Northwest Bell Telephone Co*, Memorandum Opinion and Order, 5 FCC Rec 1982 (1990) (same); *Application of GTE to Acquire Control of Telnet Corp*, 72 FCC2d 11, 135–49 (1979); *Monitoring Compliance With Conditions Underlying GTE Corp’s Acquisition of Telnet*, Further Order, 85 FCC Rep 409, 410 ¶ 5 (1981) (requesting public comment on the appropriate degree of market concentration in the data service industry); *Monitoring Compliance With Conditions Underlying GTE Corp’s Acquisition of Telnet*, Memorandum Opinion and Order, 91 FCC2d 215 (1982) (applying same); see also Jason E. Friedrich, *Thinkable Mergers: The FCC’s Evolving*

Act's passage, the Commission focuses almost exclusively on competition in conducting its public interest review.⁶⁹ In the wake of the 1996 Act, the Commission announced a "framework" for analyzing whether a license transfer will be in the public interest. In its order conditionally approving the merger of Bell Atlantic and NYNEX, the Commission announced that merging parties bear the burden of establishing that the merger's procompetitive effects will outweigh its anticompetitive effects.⁷⁰ The Commission assesses whether a merger is "likely" to result in harmful or beneficial effects on competition in any affected market.⁷¹ Its "assessment takes into account any procompetitive commitments made by the parties."⁷² The Commission also considers "merger-specific efficiencies, such as cost reductions, productivity enhancements, or improved incentives for innovation" and whether the merger "will support the general policies of opening markets and lowering entry barriers that underlie the 1996 Act."⁷³

To conduct this inquiry, the Commission's analysis follows a series of steps, many of which mimic those taken by the Department of Justice in its review under the Clayton Act. For example, the Commission begins its inquiry by first defining the relevant product and geographic markets.⁷⁴ Second, the Commission identifies "the current and potential participants in each relevant market, especially those that are likely to have a significant competitive effect."⁷⁵ Third, the Commission evaluates the merger's effects on competition in the relevant markets.⁷⁶ Fourth, the

Public Interest Standard, 6 *CommLaw Conspectus* 261, 265-66 (1998) (describing the Commission's increasing tendency to apply a procompetitive public interest standard in non-merger contexts); *id.* at 266 ("For decades, competition was only one of the things on a long list of considerations that the Commission considered."). As the telecommunications industry developed, the focus of the Commission's public interest standard was increasingly "to promote competition." William H. Read and Ronald A. Weiner, *FCC Reform: Governing Requires a New Standard*, 49 *Fed Comm L J* 289, 301-02 (1997) (pointing out that the Commission began to consider efficiency and competition concerns in its decisions opening the telephone equipment and long distance markets to new entrants).

⁶⁹ See *BA/NYNEX*, 12 *FCC Rec* at 19987 ¶ 2 ("In order to find that a merger is in the public interest, we must, for example, be convinced that it will enhance competition.").

⁷⁰ *Id.* at 20008-09 ¶ 37. The Commission approved other mergers immediately after the 1996 Act and before *BA/NYNEX*, but *BA/NYNEX* signaled a fundamental shift in its review. Compare *id.* with *SBC/PacTel*, 12 *FCC Rec* at 2626-27 ¶ 2 ("A demonstration that benefits will arise from the transfer is not, however, a prerequisite to our approval, provided that no foreseeable adverse consequences will result from the transfer.").

⁷¹ See *BT/MCI II*, 12 *FCC Rec* at 15371 ¶ 41.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 15357-58 ¶ 11.

⁷⁵ *BT/MCI II*, 12 *FCC Rec* at 15357-58 ¶ 11.

⁷⁶ *Id.*

Commission analyzes whether the merger will result in “merger-specific efficiencies, such as cost reductions, productivity enhancements, or improved incentives for innovation.”⁷⁷ The last two steps are taken directly from the Horizontal Merger Guidelines issued by the Department of Justice and the FTC.⁷⁸

Despite this similarity, the Commission does not strictly adhere to DOJ and FTC Merger Guidelines or to traditional antitrust analysis. In fact, the Commission’s “competitive effects” rubric covers an area exceedingly broader than anything the Department analyzes. Thus, although the Commission claims that its public interest inquiry is “informed by antitrust principles,” it hastens to add that “it is not governed by the scope of the antitrust laws.”⁷⁹ In the Commission’s view, “[t]he competitive analysis applied under the public interest standard is necessarily *broader* than the standard applied to ascertain violations of the antitrust laws.”⁸⁰

One critical respect in which the Commission’s competitive effects analysis is broader than the Department’s is the Commission’s focus on potential competition. In its order approving the merger of MCI and WorldCom, the Commission explained that it interprets the 1996 Act—which establishes a clear national policy of “competition leading to deregulation, rather than continued regulation of dominant firms”—as requiring it to focus on the merger’s effect on future competition.⁸¹ Because antitrust agencies such as DOJ “are required to approve mergers unless they substantially lessen competition,” the Commission reasons that “it is possible that the antitrust agencies might well approve a merger that does not decrease the *current* level of competition but that does impede the development of *future* competition.”⁸² Thus, the Commission insists on conducting its own review of the competitive effects of a transaction, with a focus on threats to *potential* rather than *actual* competition. Chairman Kennard recently

⁷⁷ *Id.*

⁷⁸ For a discussion of how the Commission applies its analytical framework, see Peter W. Huber, Michael K. Kellogg, and John Thorne, *Federal Telecommunications Law* § 7.5.4 (Aspen 2d ed 1999).

⁷⁹ *Applications of Teleport Communications Group Inc and AT&T for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order, 13 FCC Rec 15236, 15243 ¶ 12 (1998) (“*Teleport/AT&T*”) (citations omitted).

⁸⁰ *BT/MCI II*, 12 FCC Rec at 15365–66 ¶ 30 (citation omitted and emphasis added).

⁸¹ *MCI/WorldCom*, 13 FCC Rec 18034–35 ¶ 14.

⁸² *Id.* (emphasis added).

reaffirmed the Commission's belief that "[a] particular transaction that may not immediately lessen competition may have dramatic adverse consequences with respect to the future development of the marketplace."⁸³ The Commission, then, will rely on its ability to predict into the future to block or condition a merger that is otherwise not harmful to actual competition.

The Commission's review also differs from the Department's in that the Commission will consider how the merger will affect its ability to regulate as a separate factor in determining whether to approve the merger. Although one would not normally consider this as part of a "competitive effects" analysis, the Commission believes there is a direct link.⁸⁴ The Commission reasons as follows:

A reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore to contain, market power. One way that this can happen is by reducing the number of separately owned and operated carriers that can act as "benchmarks" for evaluating the conduct of other carriers or the industry as a whole.⁸⁵

The Commission has been particularly concerned with benchmarking in mergers of incumbent local exchange carriers.⁸⁶ It views the "existence of several Bell companies as an important regulatory tool,"⁸⁷ and it is reluctant to lose this tool, even if it means blocking or imposing conditions on a merger that is otherwise not anticompetitive. For example, because of its "concerns that the merger of Bell Atlantic and NYNEX will continue to reduce the diversity, and hence the quality, of comparisons of regulatory and market performance between the Bell Companies," the Commission approved the merger subject to an exten-

⁸³ *SBC-Ameritech Merger Is Fair, Kennard Tells Congress*, Telecommunications Reports 27 (May 24, 1999), quoting letter from FCC Chairman William Kennard to Representative John D. Dingell.

⁸⁴ See *BA/NYNEX*, 12 FCC Rec 20058-62 ¶¶ 147-56 (discussing the Commission's ability to regulate under its analysis of "[o]ther competitive effects").

⁸⁵ *Id.* at 20058 ¶ 147.

⁸⁶ See, for example, *id.* at 20058(a) ¶ 149 ("Each BOC serves as a benchmark against which the Commission can measure the performance and behavior of the next; such comparisons were quite impossible to do before divestiture."); *SNET/SBC*, 13 FCC Rec 21302 ¶ 21; Letter from William E. Kennard to Richard C. Notebaert and Edward E. Whitacre, Jr. at 2, Apr 1, 1999 (regarding the merger of SBC and Ameritech) ("Kennard Letter") [on file with U Chi Legal F].

⁸⁷ *BA/NYNEX*, 12 FCC Rec at 20058 ¶ 148.

sive array of conditions.⁸⁸ The Commission reasoned that its concerns regarding its ability to regulate were “not substantially mitigated by the potential efficiencies the Applicants posit.”⁸⁹

The Commission repeated this worry in its order conditionally approving the SBC/Ameritech merger. The Commission concluded that “the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures.”⁹⁰ Accordingly, the Commission placed an even greater burden on the merging parties to show “countervailing public interest benefits of this merger significantly exceeding those from previous incumbent LEC [Local Exchange Carrier] mergers in order to demonstrate that this merger, on balance, serves the public interest.”⁹¹

The Commission’s substantive analysis varies from that of the Department in yet another respect: the Commission will take into account how the merger might benefit or harm a particular group of “underserved” customers. When companies do not offer service to a particular area, it is generally because serving that area is less profitable than providing service elsewhere. Because a company is not engaging in anticompetitive behavior by serving more profitable customers, the antitrust laws do not concern themselves with this sort of economically rational behavior. As long as the merger is not likely to substantially lessen competition in a market, DOJ will not disapprove. The Commission, however, analyzes whether the merger will affirmatively benefit what it deems underserved groups, and if not, it will impose conditions to provide those groups special protection. For example, in the SBC and Ameritech merger, the Commission approved the merger subject to a variety of conditions aimed at promoting advanced services (such as high-speed internet access) to rural and urban consumers and improving residential service for low-income customers.⁹² These benefits to retail customers were the result of

⁸⁸ Id at 20069 ¶ 177.

⁸⁹ Id.

⁹⁰ *Applications of Ameritech Corp and SBC Communications Inc, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules (“SBC/Ameritech”),* 14 FCC Rec 14712, 14762 ¶ 104 (1999).

⁹¹ Id at 14794 ¶ 185.

⁹² See id at 14866–67 ¶¶ 376, 400–02.

"long and detailed discussions with the Commission Staff,"⁹³ who obviously requested conditions that would benefit these particular groups.

As the Commission's broad analysis of what it deems the "competitive effects" of a merger demonstrates, the Commission's substantive analysis under the Communications Act is far less restrained than it would be under the Clayton Act. And, in fact, the Commission has left itself the ultimate loophole to decide mergers as it sees fit: the Commission asserts that the public interest test allows it to judge a merger based on its compatibility with "the broad aims" of the 1934 and 1996 Acts.⁹⁴ Broad indeed. The Commission has noted that the Acts' goals include, "among other things": furthering a "procompetitive, de-regulatory national policy framework;" advancing "the competition policies of the Sherman and Clayton Acts;" promoting "access to advanced telecommunications and information services . . . in all regions of the Nation;" and assessing likely impacts on "the quality of telecommunications services," including "the provision of new or additional services to consumers."⁹⁵ There is little that cannot be linked in some respect to these purposes.

II. THE AGENCY MINDSET: THE SUBSTANTIVE INFLUENCE

As the preceding section made clear, DOJ and the FCC engage in vastly different substantive evaluations of telecommunications mergers. Although they both claim to analyze competitive effects, they give strikingly varying content to what that entails. The Department follows a set of merger guidelines that directs parties to the critical factors being analyzed—factors that represent the traditional antitrust concerns of market power, ease of entry, efficiencies, and the like. The Commission, in contrast, takes a much broader view and will judge a merger not merely against the settled backdrop of antitrust concerns, but also based on its compatibility with "the broad aims" of the 1934 and 1996 Acts—aims that allow the Commission to consider just about anything in its review of mergers. And the Commission does not indicate how it will balance each of the various factors and concerns it considers.

⁹³ See Letter from Richard Hetke, Ameritech Corporation, and Paul K. Mancini, SBC Communications Inc, to Magalie Roman Salas, Secretary, FCC, CC Dkt No 98-141 1 (filed with FCC Aug 27, 1999) ("Hetke/Mancini Letter").

⁹⁴ *BA/NYNEX*, 12 FCC Rec at 20002 ¶ 31.

⁹⁵ *Id* (footnotes omitted).

The agencies also differ in their treatment of competitively neutral cases. The Commission will approve a merger only if it is procompetitive—that is, if the parties can demonstrate that the merger will affirmatively advance competition. If the merger is competitively neutral (that is, if it will neither advance nor retard competition), it would fail the Commission's stated test. In contrast, DOJ will not block such a transaction.⁹⁶ In fact, the Clayton Act demands that even transactions that *lessen* competition must be permitted to go forward; they may be blocked only if the Department proves that they may *substantially* lessen competition.

The short answer, then, to explain any difference in outcome between the two agencies is that they do not, in fact, apply the same substantive standard despite the claim by both that they are focusing on competition. "Competitive effects" means different things to each agency. The Department will consider various market-based criteria that it has described in a series of guidelines. The Commission will consider virtually anything that touches on its broad regulatory mandate. The Department's test will permit competitively neutral transactions; the Commission's test will block them. The Department bears the burden of proof and gets no deference on its findings; the Commission places the burden on the parties and is entitled to substantial deference in its factual conclusions.

But to rely on these substantive differences alone to explain the varying treatment of mergers, without probing any deeper, is to ignore a much more complicated dynamic. Why does the Commission explore so many additional factors in the name of promoting competition—even when those factors seem to bear little relationship to competition? Why does the Commission begin from a presumption that a merger should be disapproved and place the burden on the parties to prove otherwise? Why does the Commission fail to enunciate clear guidelines that will allow parties to predict the fate of their license reviews? Why does the Commission proceed only under the Communications Act and never the Clayton Act? It is only by seeking the answers to these questions that we begin to understand the critical role of an agency's view toward regulation.

⁹⁶ See HR Rep No 105-118 at 10 (statement of Joel Klein) (cited in note 16) (noting that the antitrust laws "strike the right balance in allowing [DOJ] to stay out of the way of procompetitive or innocuous mergers, while giving us full authority to challenge anticompetitive mergers when we find them," and observing that the FCC requires that mergers "enhance competition" while DOJ is concerned with mergers that "will substantially *lessen* competition").

The primary source of the agencies' substantive disagreement is the different view each agency possesses regarding the appropriate role of an agency. This fundamental divergence in outlook colors the inquiry of both agencies and leads to disparate results. Indeed, the contrary underlying visions of lawmaking account for the different content given to "competitive effects," the manner in which competitively neutral transactions are treated, the opposite burdens of proof, and the guidance the agencies provide the parties.

A. DOJ: A Market-Based Preference

Because the Department does not regulate in a particular substantive area, it generally does not use merger adjudications as an opportunity to advance a particular social agenda. That is, DOJ gauges a merger in relation to general competition principles as opposed to specific substantive policies. The Department adheres to the simple prescript that the antitrust laws are designed to promote competition, not particular competitors.⁹⁷ The Department follows a core policy to "prevent agreements or mergers that create or increase market power, or unilateral actions that use existing market power to protect or expand a monopoly."⁹⁸ The Department then applies that policy to the particular market and facts at issue, usually without seeking to interfere beyond this basic principle. There are no additional social policies that the Department's Antitrust Division regulates. For example, it does not regulate the day-to-day operations of telephone companies or electric utilities, nor does it establish the nation's environmental policy or set consumer product safety standards. It simply applies the common-law-rooted antitrust laws to myriad markets. And that approach generally gives the benefit of the doubt to market forces.

B. The Commission's Bias Against Mergers

After an agency lifetime of regulating telecommunications companies and imposing its own views of what is best for competition in that industry, the Commission has developed a bias against letting the market determine what is the optimal competitive outcome. This disposition has infected the Commission's outlook on a variety of matters, including its substantive merger

⁹⁷ Klein, *Importance of Antitrust Enforcement* at 13 (cited in note 25).

⁹⁸ *Id.* at 15.

policy and the procedural framework in which the Commission chooses to operate. Thus, the Commission presumes competitive danger if parties are allowed to combine freely in the marketplace and places the burden on the merging parties to show otherwise.

The burden, moreover, is not simply to establish that the merger will not “substantially lessen competition.”⁹⁹ Rather, the Commission requires the parties to show that the merger will affirmatively *promote* competition.¹⁰⁰ The Commission takes this tack despite the fact that the Commission has a powerful arsenal to address any anticompetitive behavior in violation of its rules that arises after the merger is consummated. For example, it has the power to revoke licenses¹⁰¹ or to issue cease and desist orders.¹⁰² Moreover, if its current rules are ineffective to govern a particular practice that violates the Act, it can enact a rule of general applicability to deal with the problem. Despite these options, the Commission prefers to rely on its predictive judgment regarding potential competition instead of actual competitive realities,¹⁰³ and it takes a decidedly pessimistic view toward consolidation.

The Commission’s eagerness to impose conditions on mergers¹⁰⁴ involving an entire array of new obligations on the parties further reveals its regulatory bias. The Bell Atlantic/NYNEX and SBC/Ameritech mergers illustrate how onerous and rule-like the Commission’s merger conditions can be.¹⁰⁵ Bell

⁹⁹ 15 USC § 18.

¹⁰⁰ See, for example, *BA/NYNEX*, 12 FCC Rec at 20002 ¶ 31, 20007 ¶ 36.

¹⁰¹ See 47 USC § 312(a) (1994 & Supp 1998). One reason the Commission may resist revocation is that there is a presumption in favor of a license once it has been issued; the burden of proof falls on the FCC to prove otherwise. 47 USC § 312(d) (1994 & Supp 1998).

¹⁰² 47 USC § 312(b) (1994 & Supp 1998).

¹⁰³ The Commission applies a variation of the “actual potential competition doctrine,” which has been widely criticized for “involving courts in undue speculation and for demanding excessive speculation about the oligopoly market at issue”. Philip Areeda and Herbert Hovenkamp, 3 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 701(d) (Little, Brown rev ed 1996). Not only have many courts explicitly reserved judgment on whether the doctrine is even valid under Section 7 of the Clayton Act, but Government attempts to invoke the doctrine have been unsuccessful. See *Antitrust Law Developments* at 322–28 (collecting cases) (cited in note 29).

¹⁰⁴ Section 214 authorizes the Commission to attach to wireline certificates “such terms and conditions as in its judgment the public convenience and necessity may require.” 47 USC § 214(c) (1994 & Supp 1998). Section 303(r) likewise authorizes the Commission to incorporate conditions in wireless licenses. It provides that “the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.” 47 USC § 303(r) (1994).

¹⁰⁵ For a more detailed discussion of the conditions imposed in *BA/NYNEX*, see Huber, *Federal Telecommunications Law* at § 7.5.4.7 (cited in note 78).

Atlantic and NYNEX agreed to a multitude of conditions to satisfy the Commission that their merger was in the public interest. For instance, the parties had to provide detailed monitoring reports—which include detailed data on ordering, repair and maintenance, network performance, and various other factors—to competing carriers, state agencies, and the Commission. The Commission further required the companies to provide elements of their network to their competitors based on “forward looking economic costs,” despite the fact that the Eighth Circuit had recently rejected such access.¹⁰⁶ SBC and Ameritech agreed to conditions that were even more sweeping after “[t]he Chairman asked that Ameritech and SBC pursue discussions with the Commission Staff to craft conditions” addressing his concerns with the merger. SBC and Ameritech committed to “stringent performance monitoring, auditing, and enforcement provisions that go well beyond what the Commission has required of potential merger partners in the past.”¹⁰⁷ They pledged to expand into thirty new markets or face more than a billion dollars in damages. The companies agreed to offer various discounts to their competitors and to waive certain charges for residential customers. The companies also promised to provide advanced services through a separate affiliate for at least three years. And the list goes on.¹⁰⁸

It should be noted that not all mergers face such extensive conditions. Indeed, the SBC/Ameritech and Bell Atlantic/NYNEX mergers involve perhaps the most extensive conditions imposed on mergers since the 1996 Act. But that reflects the fact that incumbent carriers such as SBC, Ameritech, Bell Atlantic, and NYNEX are generally regulated more heavily by the Commission than other parties even outside the merger context. The Commission imposed the same proportional oversight on those parties when they sought merger approval. In any event, the Commission has not hesitated to seek conditions from other merging parties that are not as heavily regulated as incumbent local carriers. In approving the AT&T/McCaw merger, for example, the Commis-

¹⁰⁶ *BA/NYNEX*, 12 FCC Rec at 19988 ¶ 4, 19992 ¶ 13.

¹⁰⁷ Hetke/Mancini Letter (cited in note 93).

¹⁰⁸ See *SBC/Ameritech*, 14 FCC Rec at 14964, Appendix C for a list all of the conditions. Bell Atlantic and GTE agreed to similar conditions to gain merger approval. See *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Dkt No 98-184, Appendix D (June 16, 2000), available online at <http://www.fcc.gov/Daily_Releases/Daily/Business/2000/db0616/fcc00221.txt> (visited Oct 23, 2000) (“*BA/GTE*”).

sion required the companies to offer local cellular and long-distance service on an unbundled basis.¹⁰⁹ The Commission further ordered AT&T to “not unreasonably discriminate” in McCaw’s favor in the development of proprietary technology or in the supply of cellular equipment.¹¹⁰ In analyzing the proposed transfer of stock between BT and MCI, the Commission would have subjected British Telecom and MCI to various reporting requirements and insisted that MCI offer some of its capacity on its route between the U.S. and the U.K.¹¹¹ MCI/WorldCom also received conditional approval from the Commission, including a requirement that MCI divest its internet backbone assets prior to the merger.¹¹²

In sum, the Commission subjects numerous parties to detailed regulatory requirements, mandating particular outcomes and results, as conditions for gaining FCC merger approval.¹¹³

C. The Agencies’ Antitrust Policies Compared

Although both the Department and the Commission have years of experience making determinations about competition and exercising authority over mergers, the FCC and DOJ have emerged with polar opposite viewpoints. The Department typically interferes minimally and seeks to avoid command-and-control remedies that involve extensive oversight. It generally uses adjudications for the narrow purpose of enforcing the anti-trust laws and avoids opening those procedures to broader social-policy calls.

The FCC maintains a much broader view of what can—and should—be accomplished in a merger proceeding. Historically, the Commission has exercised almost total control over the nation’s telephone industry. Although the 1996 Act represents Congress’s desire to move telecommunications away from regulation and toward free markets and competition,¹¹⁴ the agency’s mindset

¹⁰⁹ *Craig O. McCaw & AT&T, Application for Consent to the Transfer of Control*, Memorandum Opinion and Order, 9 FCC Rec 5836, 5928 ¶ 176 (1994). The companies also agreed to abide by certain customary proprietary network information rules. *Id.* at 5928–29 ¶ 178.

¹¹⁰ *Id.* at 5929 ¶¶ 182–84.

¹¹¹ *BT/MCI II*, 12 FCC Rec at 15461–62 ¶ 286, 15465–66 ¶ 297.

¹¹² *MCI/WorldCom*, 13 FCC Rec at 18026–27 ¶ 1.

¹¹³ “Customers and regulators can throw away their copies of the Communications Act and the commission’s regulations. The real rules are now in the FCC’s orders approving this particular transaction.” Harold Furchtgott-Roth, *The FCC Racket*, Wall St J A18 (Nov 5, 1999).

¹¹⁴ Telecommunications Act of 1996, Pub L No 104-104, 110 Stat 56, at Preamble, codified at 47 USC §§ 151 et seq (1994 & Supp 1998). Although the Act removes many

has not quite caught up with the changing regulatory world in which it now exists. The Commission's practice with mergers proves the point. Although DOJ gave the Bell Atlantic/NYNEX and SBC/Ameritech mergers the green light with few or no strings attached,¹¹⁵ the Commission required the companies to commit to a multitude of conditions. The Commission could not resist the impulse in these merger review proceedings to take control of the transactions and mold them to its liking.

Perhaps the most revealing illustration of the Commission's regulation bias is the Commission's inclusion of its own ability to regulate as one of the "competitive" factors it considers in evaluating a license transfer. As noted above, the Commission approved the Bell Atlantic/NYNEX and SBC/Ameritech unions only after imposing conditions to compensate for what the Commission viewed as "the grave harms" the mergers "pose[d] to the regulatory processes."¹¹⁶ The Commission claims—with little regard for irony—that consolidation of the Bell companies eliminates comparative benchmarks,¹¹⁷ which makes it more difficult for the Commission to regulate, which in turn may "delay the transition to competitive, deregulated telecommunications markets."¹¹⁸ In other words, the Commission believes that regulation is necessary to bring about deregulation, and that a merger that is not anticompetitive should be blocked solely because it might make regulation more difficult.¹¹⁹ This type of logic is anathema to a free market and deregulation. Yet this reasoning drives the Commission's approach to mergers.

regulatory restrictions, it is not, strictly speaking, an example of pure "deregulation." The 1996 Act "contains over 100 pages of regulatory requirements, directs the Federal Communications Commission (FCC) to commence more than a dozen rulemaking proceedings, and is being implemented through scores of arbitrations throughout the states, each of which is subject to judicial review." Kearney and Merrill, 98 Colum L Rev at 1325 (cited in note 13); see also HR Rep No 104-204, 104th Cong 1st sess 207 (1995) (additional views of Reps Dingell, Tauzin, Boucher, and Stupak) (agreeing that the bill that became the 1996 Act is deregulatory in some respects but noting that it "imposes onerous regulations that will delay and make extremely difficult Bell Company entry into new lines of business").

¹¹⁵ As noted in Part I B, the Department required divestiture of overlapping cellular properties.

¹¹⁶ *SBC/Ameritech*, 14 FCC Rec at 14794–95 ¶ 185.

¹¹⁷ The courts and the Merger Guidelines recognize benchmarks only in the commercial sense—that is, whether the competitive "benchmarks" against which consumers may make marketplace choices will be reduced by the merger. The Commission, however, is concerned with regulatory benchmarks, which allow it to compare companies against one another.

¹¹⁸ *BA/NYNEX*, 12 FCC Rec at 20060–61 ¶ 152.

¹¹⁹ See Furchtgott/Whitacre Letter at 2 (cited in note 20) ("[I]t is an odd policy position indeed which holds that an otherwise legitimate merger will be prohibited if it impairs the government's ability to regulate.").

In contrast, DOJ follows the antitrust laws, which “act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. The Department generally does not affirmatively order firms to behave in specified ways; for the most part, the Department tells private firms what not to do.”¹²⁰ With the exception of divestiture requirements and the like in consent decrees,¹²¹ DOJ rarely “create[s] the detailed web of affirmative legal obligations that characterizes classical regulations.”¹²² By and large, as Justice Breyer has pointed out, “[t]he antitrust laws seek to create or maintain the *conditions* of a competitive marketplace rather than replicate the *results* of competition or correct for the defects of competitive markets.”¹²³ The Department therefore sees its role as different from that of the Commission.¹²⁴

The Commission has a preference for “competitive processes and outcomes.”¹²⁵ And this preference leads it to favor regulation—in which it can control outcomes directly—over market forces, which may or may not yield the particular result the Commission prefers. The Commission clings to the belief that it can promote competition most effectively by actively interfering with market transactions and conditioning merger approvals to produce what it believes will be procompetitive results.¹²⁶ In doing

¹²⁰ Breyer, *Regulation and Its Reform* at 157 (cited in note 64).

¹²¹ A recent example of aggressive behavior in the divestiture context is DOJ's request that Microsoft be split into multiple components. See Plaintiffs' Proposed Final Judgment, *United States v. Microsoft Corp.*, Civ. Action No. 98-1232 (D. DC), available online at <<http://www.usdoj.gov/atr/cases/f4600/4639.htm>> (visited May 6, 2000).

¹²² Breyer, *Regulation and Its Reform* at 157 (cited in note 64).

¹²³ *Id.* at 156–57.

¹²⁴ Indeed, a previous antitrust chief expressly warned against an overly regulatory approach when speaking to FERC about its authority to condition merger approvals and exercise continued jurisdiction over merged entities under the Federal Power Act:

Although this authority is certainly very useful, I would caution against allowing it to result in an overly regulatory approach to merger review during the transition to competition. While I recognize, of course, that [FERC] is a regulatory agency, and that the electric power industry has long been highly regulated, restructuring obviously is intended to move away from that paradigm.

Klein, *Making the Transition from Regulation to Competition* at 15 (cited in note 14).

¹²⁵ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rec 3160, 3169 ¶ 14 (1999) (“AT&T/TCF”).

¹²⁶ Senator McCain has observed that a majority of the current Commission places “too little confidence in competition and way too much in regulation.” Telecommunications Reports 27 (May 31, 1999); see, for example, *Kennard Defends FCC on Merger Review at House Hearing*, Communications Daily 1 (Nov. 4, 1999) (quoting Chairman Kennard as stating that his job is to advance competition, a goal he notes is different from that of the Department).

so, the Commission makes predictive judgments about the future and errs on the side of blocking transactions. In addition, the Commission will consider not just whether the merger will harm competition, but whether it would "frustrate [its] implementation and enforcement of the Communications Act and federal communications policy."¹²⁷

In the end, however, the Commission's presumption against mergers has a negative impact on competition. "The most serious consequence of an overly broad prohibitory rule is its interference with mergers that would yield procompetitive or other economic benefits."¹²⁸ As Professor Areeda has observed, "many of the rationales for mergers are fully consistent with the aims of anti-trust policy and are themselves procompetitive, at least in the absence of market power."¹²⁹ For example, horizontal mergers "can easily facilitate efficiencies, assign assets to a superior manager, eliminate duplication, or have other effects that benefits the firms and that antitrust generally regards as beneficial to society."¹³⁰ Vertical mergers can drastically reduce transaction costs. "A merger that improves efficiency enables the merged firm to compete more effectively and, perhaps, to induce more efficient performance among its competitors."¹³¹ The Commission's overbroad rule against mergers will inevitably cause many of these beneficial mergers to collapse and their potential efficiencies to be lost.

Allowing all but assuredly harmful mergers to materialize brings another benefit: it maintains a strong market for capital assets, which in turn "increases the reward of successful entrepreneurial endeavor."¹³² That is, the prospect of a lucrative

¹²⁷ *AT&T/TCI*, 14 FCC Rec at 3169 ¶ 14.

¹²⁸ Areeda and Turner, 4 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 905d (cited in note 29).

¹²⁹ *Id.* at ¶ 901a; see also Written Statement by Joel I. Klein before the Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, United States Senate, Concerning the 1996 Telecommunications Act: An Antitrust Perspective, 1997 WL 14150957 (Sept 17, 1997) ("The Department's basic mandate under the Clayton Act is to monitor all mergers carefully, ensuring that prospects for competition are not jeopardized by anticompetitive mergers, while recognizing that in many cases, competition will be promoted through efficiency-enhancing combinations."); Statement of Joel I. Klein Before the Antitrust, Business Rights and Competition Subcommittee, Committee on the Judiciary, United States Senate 2 (Feb 26, 1998) ("Klein Feb 26, 1998 Subcommittee Statement"), <<http://www.usdoj.gov/atr/public/testimony/1581.htm>> (visited Feb 22, 2000) ("[M]ost mergers and other business alliances foster efficiency and thus bring increased benefits to consumers and businesses.").

¹³⁰ Areeda and Turner, 4 *Antitrust Law* at ¶ 901a (cited in note 29).

¹³¹ *Id.*

¹³² *Id.* at ¶ 905d.

merger opportunity in the future entices entrepreneurs initially to form and expand firms. The Commission's presumption against mergers deters this behavior.

Ideally, only anticompetitive mergers should be blocked and all others allowed to proceed. It is impossible, however, to make perfect judgments in every case: any standard will inevitably be over- or under-inclusive. The Department proceeds from the premise that, if one must err, it should be on the side of the free market, not agency fiat. Free transferability, not regulatory caveat, is more likely to place capital assets "in the hands of those who will use them to their utmost economic advantage; it thus tends to maximize society's total output of goods and services."¹³³ Moreover, if a telecommunications transaction ultimately proves to be anticompetitive, action can be taken at that point to remedy the situation. In contrast, in this dynamic marketplace, there is nothing that can be done for a merger that has died under the Commission's presumption against mergers.

This core logic underlies our nation's antitrust laws. Free market principles prompted Congress to vest authority in government agencies to block mergers under the Clayton Act only when their effect may be to lessen competition *substantially*. And, as a former DOJ antitrust chief has explained, "[a]ntitrust enforcement has rightly enjoyed substantial bipartisan support throughout the years" because "American consumers and businesses benefit from the kind of free-market economy that antitrust enforcement engenders."¹³⁴ Indeed, it could be argued that the same rationale led Congress to pass the 1996 Act, with its dual and linked goals of promoting competition and reducing regulation.¹³⁵ The Commission's approach to mergers is fundamentally at odds with this reasoning, and, accordingly, it threatens to undermine the policies of both Acts. But the Commission is a prisoner to this approach because of its underlying bias in favor of broad regulation.

¹³³ Id at ¶ 901a.

¹³⁴ Klein, Concerning the 1996 Telecommunications Act: An Antitrust Perspective at *2 (cited in note 129).

¹³⁵ Telecommunications Act of 1996, Pub L No 104-104, 110 Stat 56, at Preamble, codified at 47 USC §§ 151 et seq (1994 & Supp 1998). As discussed, Congress did not envision that the Commission's reign over telecommunications would come to an end. But Congress indicated clearly that the *goal* for the Commission is to further competition, deregulation, and innovation, wherever possible. That is, Congress intended that, wherever possible, the Commission should adopt a hands-off policy.

III. THE AGENCY MINDSET: THE CRITICAL ROLE OF PROCESS

Thus far, we have focused on how the agencies' respective visions of government and markets have influenced their substantive merger standards. But that is, at most, only half the story. Perhaps less obvious, but potentially far more important, is how the agencies' regulatory (or deregulatory) mindset intersects with its selection of administrative procedures. In this section, we discuss the core procedural models and describe the agencies' respective approaches to these paradigms. As we discuss further below, whether one agrees or disagrees with the Commission's substantive antitrust approach to mergers, its procedural tactics in merger reviews raise fundamental questions of administrative law and policy.

A. The Procedural Paradigms

An agency chooses more than a procedure when it selects a particular administrative law model;¹³⁶ it also embraces a particular vision of governance. At its core, governance by adjudication can be traced to a preference for private action and free markets over governmental interference. Only when private action leads to conflict does the adjudicatory process come into play. The proceeding itself is limited: the focus is on the particular facts between the parties, and the adjudication is designed simply to resolve the conflict and to go no further.¹³⁷ The remedy typically

¹³⁶ We discuss idealized, Platonic "models" of adjudication and rulemaking, focusing on their general characteristics and differences. "While the line dividing them may not always be a bright one, [there is] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases, on the other." *United States v Florida East Coast Railway Co*, 410 US 224, 245 (1973). These core models serve as benchmarks for our discussion of how and why agencies (in particular the FCC and DOJ) diverge from the ideals and what consequences flow from that departure. We recognize that, in reality, the line between adjudications and rulemakings is not nearly so clean. See, for example, *NLRB v Wyman-Gordon Co*, 394 US 759, 770-71 (1969) (Black concurring) ("The line between [rulemaking and adjudication] is not always a clear one and in fact the two functions merge at many points."); see also Shapiro, 78 Harv L Rev at 930-32 (cited in note 64) (noting that, in some instances, an adjudication may allow as much notice and comment as a rulemaking); id at 935-36 (observing that adjudications can be brought on such a broad scale that the treatment of regulated individuals can be as evenhanded as when an agency announces a generally applicable policy in a rulemaking). In addition, we should note that, for purposes of the APA, there are more intricate procedural differences between the two methods—and between formal and informal proceedings. See APA §§ 5, 7 & 8, codified at 5 USC §§ 554, 556, 557 (1994).

¹³⁷ See Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L J 571, 587 (1970); see also Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv L Rev 393, 403 (1981) (arguing

focuses "on the removal of irritants than on the attainment of ideals."¹³⁸

Because adjudication begins from the reactionary premise that government should interfere only when particular parties bring a specific matter before it, it is not a process designed to obtain the massive amounts of information needed to formulate general policy that affects large numbers of individuals. Thus, the general public is not entitled to notice of the action, nor is it given the right to comment on all the issues raised by the matter.¹³⁹ Instead, the adjudicator relies upon the named parties to provide the relevant information. In addition, for this essentially common-law model to work effectively, the adjudicator generally operates under a standard that is broad enough to allow it to decide the conflict no matter what the circumstances or facts. The adjudicator gives content to that standard in the particular case,¹⁴⁰ and the adjudication itself then serves as a precedent.¹⁴¹

A rulemaking starts from a fundamentally different premise: instead of allowing parties to shape the evolution of the law, the rulemaking model relies upon expert agencies and legislators to design effective solutions to anticipated problems. Whereas adjudication is reactive, rulemaking is proactive. It reaches out to decide potential issues that will affect entire classes of persons and practices and seeks to shape future behavior by laying out the ground rules in advance.¹⁴² The rulemaking process, then, is akin

that "adjudication is customarily, if not intrinsically, incremental," that "[t]he participants' needs circumscribe the decisionmakers' lawmaking role," and that adjudicators "ordinarily attempt to extend policy no further than needed to dispose of the issues at hand"). Of course, what is necessary to resolve the conflict is subject to wide interpretation and depends in large part on one's model of adjudicative justice. See, for example, Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 Duke L J 181, 185-90 (describing three models of justice that apply to disability and similar programs: "bureaucratic rationality," "professional treatment," and "moral judgment").

¹³⁸ Diver, 95 Harv L Rev at 404 (cited in note 137).

¹³⁹ Of course, a decision in an adjudication "may have far-reaching significance by reason of the rule it lays down, and affect many persons besides the particular litigants." Shapiro, 78 Harv L Rev at 930 (cited in note 64). Indeed, this Article discusses just such a circumstance. But the *procedures* attendant to an adjudication reflect the premise that an adjudication is generally more limited.

¹⁴⁰ In so doing, the agency can "evolve detailed and precise rules." Shapiro, 78 Harv L Rev at 926 (cited in note 64). Or it can offer little guidance as to how particular facts will be weighed. See Friendly, *Federal Administrative Agencies* at 97 (cited in note 60).

¹⁴¹ *NLRB v Wyman-Gordon Co*, 394 US at 766.

¹⁴² Robert W. Ginnane, "Rule Making," "Adjudication," and "Exemptions Under the Administrative Procedure Act," 95 U Pa L Rev 621, 630 (1947) ("Rule making is agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy.").

to the process of statutory enactment. Although a legislature is the classic rulemaking body, no one with even a passing familiarity of the modern administrative state would deny that agencies provide the bulk of the rules that govern our conduct.

Because rulemakings have such a broad sweep, the agency rulemaking process varies dramatically from the agency adjudicatory process. Because the resulting rule will affect a broad class of people, an agency provides notice and an opportunity for general participation in its deliberative rulemaking process. Mass participation increases the likelihood that the agency will promulgate an effective rule because the agency will have relevant information from a large number and variety of sources.

The model the agency selects¹⁴³ is not without consequence: administrative process influences outlooks and outcomes. The procedural choice frames the perspective of the agency and interested parties. It determines what information gets considered and who participates. Indeed, the procedure selected is frequently tantamount to selecting a particular result.

B. DOJ and FCC Approaches to Adjudication

The Department and the Commission do not merely diverge as a matter of substantive competition review; they also follow different procedural models. Although both proceed through adjudications, their respective visions of what that entails are markedly different. That is, just as both agencies give different content to the "competitive effects" substantive analysis, so too do the agencies diverge on what it means to conduct an adjudication. The Department adheres more closely to the traditional model of an adjudication; the Commission's proceedings resemble rulemakings as much as adjudications.

We must emphasize, of course, that we are speaking in terms of generalities. Often, the Commission will approve a license transfer in a straightforward adjudication. Similarly, we cannot say that the Department has never taken a proactive regulatory approach. Some would say Microsoft is such a case. Or, to take an infamous example from telecommunications, the Department and Judge Harold Greene collaborated in a twelve-year quasi-rulemaking after Judge Greene entered the consent decree in

¹⁴³ "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v Chenery Corp.*, 332 US 194, 203 (1947).

1982 ordering AT&T to divest its local operating companies.¹⁴⁴ When the decree was entered, no formal divestiture plan had been formulated.¹⁴⁵ Judge Greene therefore authorized 110 private and public entities to intervene and comment on a proposed plan.¹⁴⁶ After the Department demanded multiple amendments to a reorganization plan proposed by AT&T, Judge Greene invited additional comment on the plan.¹⁴⁷ Some fifty intervenors took the opportunity to comment, raising hundreds of issues.¹⁴⁸ The judge then conducted a hearing and entered a 159-page opinion.¹⁴⁹ But that was far from the end of the matter. Instead, what followed was more than a decade of thousands of advisory letters, briefs, and motions.¹⁵⁰ The decree had taken on a life of its own and touched on every aspect of telecommunications. Judge Greene viewed the decree as “establishing merely a broad outline of a plan for an extremely complex transaction or series of transactions, with massive implications, leaving many details for subsequent implementation.”¹⁵¹ Indeed, Judge Greene believed “the decree may be analogized to a piece of legislation”¹⁵² and, accordingly, he (along with input from DOJ) set forth a web of rule-like mandates that governed such areas as entry into long-distance markets, entry into wireless long-distance, and entry into information services delivery.¹⁵³

Thus, even the Department, which does not administer a set of substantive policies, has succumbed to the temptation to expand the scope of an adjudication, and took an active role in the AT&T divestiture “rulemaking.” Nevertheless, this model of government and adjudication is, relatively speaking, rare for DOJ. The Department generally sees its role as more circumscribed. The Department does not have a broad public interest mandate as does the FCC. “Instead, as a law enforcement agency,” it has “the burden of proving that a merger is anticompetitive and ille-

¹⁴⁴ Michael K. Kellogg, et al, *Federal Telecommunications Law* § 4.5 at 216 (Little, Brown 1st ed 1992).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* § 4.5 at 219.

¹⁴⁸ Kellogg, *Federal Telecommunications Law* at 219 (cited in note 144).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* § 7.1 at 344–45.

¹⁵¹ *United States v Western Electric Co*, 578 F Supp 653, 655 n 6 (D DC 1983).

¹⁵² *United States v Western Electric Co*, 592 F Supp 846, 856 n 27 (D DC 1984), appeal dismissed, 777 F2d 23 (DC Cir 1985).

¹⁵³ See generally Kellogg, *Federal Telecommunications Law* §§ 4–7 at 226 (cited in note 144).

gal.”¹⁵⁴ And when the Department reaches such a conclusion, it looks “for a way to prevent the anticompetitive aspects of that merger from going forward, while not prohibiting parts of the deal that do not raise anticompetitive concerns.”¹⁵⁵ The Department generally focuses on the behavior of the particular parties before it, and the relief is usually retrospective, not prospective.¹⁵⁶ Thus, the Department generally proceeds according to the traditional common law model and does not seek to impose broader policies in an adjudication.¹⁵⁷

The Commission, in contrast, generally takes a much broader view of an adjudication. As discussed above, the Commission’s main device for expanding the scope of an adjudication is its power to order merging parties to submit to conditions in order to obtain license transfer approval. To be sure, some of these conditions are necessary for the parties to comply with existing Commission rules; in those instances, it is hardly an abuse of the agency’s adjudicatory authority to condition a license transfer on compliance with those rules.¹⁵⁸ Because the license transfer itself causes the violation, it is perfectly reasonable for the agency to make complying with the rules a condition of the transfer, whether or not the condition is directly related to a “competitive effects” analysis. Indeed, enforcement of existing rules is one of the core purposes of an adjudication.

¹⁵⁴ HR Rep No 105-118 at 9 (statement of Joel Klein) (cited in note 16).

¹⁵⁵ Klein Feb 26, 1998 Subcommittee Statement (cited in note 129).

¹⁵⁶ To the extent the Department does issue prospective relief in a consent decree, it is generally for a finite period. “With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division’s standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. The staff should not negotiate any decree of less than 10 years’ duration, although decrees of longer than 10 years may be appropriate in certain circumstances.” US Department of Justice, Antitrust Division, *Antitrust Division Manual* Ch IV(E)(2) (3d ed 1998).

¹⁵⁷ See Klein, *Making the Transition from Regulation to Competition* at 16 (cited in note 14) (“[B]ased on centuries of experience, [the Department is now] highly skeptical of any relief that requires judges or regulators to take on the role of constantly policing the industry. Relief generally should eliminate the incentive or the opportunity to act anti-competitively rather than attempt to control conduct directly. [The Department is] institutionally skeptical about code-of-conduct remedies. The costs of enforcement are high and, in our experience, the regulatory agency often ends up playing catch-up, while the market forces move forward and the underlying competitive problems escape real detection and remediation.”).

¹⁵⁸ See, for example, *ATT/TCI*, 14 FCC Rec at 3207-08 ¶¶ 98-99, 107 (1999) (conditioning approval of license transfer application on AT&T-TCI transferring ownership of Sprint PCS tracking stock to a trust prior to consummation of the merger in order to bring the companies in compliance with the Commission’s wireless spectrum cap rules).

Many conditions imposed in license transfer proceedings, however, do not involve enforcement of existing Commission rules. Far from it, the conditions themselves are comparable to new regulations because they impose additional, elaborate, and intrusive requirements on the merging parties. These conditions, moreover, rarely reflect the Commission's desire to address a particular ill effect directly caused by the license transfer before it. More often, the Commission is concerned with a particular industry practice or trend and sees a license transfer application as its opportunity to address a general concern, albeit with jurisdiction over only the parties to the transaction. The Commission realizes that, because many similarly situated parties will also have pending license transfer applications, the Commission's policy can be implemented broadly even if it must do so on a case-by-case basis.

The Bell Atlantic/NYNEX and SBC/Ameritech mergers offer examples of the Commission camouflaging new general policies in the context of an adjudication. In approving the Bell Atlantic and NYNEX merger, the Commission insisted on a laundry list of requirements, including reporting requirements, performance reports, a multitude of tests, and various enforcement mechanisms.¹⁵⁹ The Commission even had the parties agree to comply with requirements that the Eighth Circuit had just struck down, brazenly asserting that the Commission's defeat in that case resulted in market "uncertainty."¹⁶⁰ Thus, to get their merger approved, Bell Atlantic and NYNEX had to give back to the Commission some of what they had won from it in the Eighth Circuit.¹⁶¹ The merger adjudication gave the Commission a forum it otherwise lacked to advance its regulatory agenda.

The recent SBC and Ameritech merger provides another illustration of how the Commission effectively imposes new policy in the context of a specific adjudication. In order to get their merger approved, SBC and Ameritech agreed to provide advanced services to customers through a separate affiliate. At the time the Commission and the merging parties negotiated this policy, the merits of a separate affiliate policy were being consid-

¹⁵⁹ See generally *BA/NYNEX*, 12 FCC Rec at 20107, Appendix C.

¹⁶⁰ See *id.* at 19988 ¶ 4 ("We must be especially concerned about mergers between incumbent monopoly providers and possible rivals during this initial period of implementation of the 1996 Act Key portions of [the Local Competition Orders] recently were vacated, which created even greater uncertainty as to the pace of development of competition.").

¹⁶¹ *Id.* at 19993 ¶ 14, 20070-79 ¶¶ 181-200.

ered by the Commission in a rulemaking proceeding—which was to apply to the entire industry.¹⁶² The Commission leapfrogged ahead of that process, however, and effectively made up its mind in the SBC/Ameritech merger. The Commission noted that “[e]stablishing an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm’s” incumbent local exchange carriers.¹⁶³ The Commission believed the condition would ensure a “level playing field” between the incumbent local exchange carriers of SBC/Ameritech and its advanced services competitors, therefore the conditions would “greatly accelerate competition in the advanced services market.”¹⁶⁴ It is difficult to see how this policy course will not be adopted more broadly based on the Commission’s statements. In fact, the Commission has followed it since the merger order. Bell Atlantic “voluntarily” agreed to the same condition in order to obtain approval to provide long distance.¹⁶⁵ And Bell Atlantic and GTE agreed to a similar condition to get their merger approved.¹⁶⁶

The Commission is able to impose these requirements in a merger proceeding because it has the ultimate trump card: its ability to deny the merger outright. The parties can—and do—agree to any number of conditions in order to get their mergers approved. Because a merger is often critical to the competitive survival of a company, the parties frequently have no other practical choice. Under these circumstances, it is a bit of a stretch to deem the conditions “voluntary.”¹⁶⁷

The SBC/Ameritech merger illustrates the coercive nature of the dynamic. SBC and Ameritech filed their application for license transfer approval with the Commission in July of 1998. Almost a year later, the Commission still had not acted on the application. The Chairman of the FCC wrote the CEOs of each company informing them that the Commission’s staff had “raised a number of significant issues with respect to potential public

¹⁶² See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rec 24011, 24051–64 ¶¶ 85–117 (1998).

¹⁶³ *SBC/Ameritech*, 14 FCC Rec at 14859 ¶ 363.

¹⁶⁴ *Id.*

¹⁶⁵ See Letter from Dee May, Bell Atlantic, to Magalie Roman Salas at 7 (Dec 16, 1999) [on file with U Chi Legal F].

¹⁶⁶ See *BA/GTE*, Appendix D (cited in note 108).

¹⁶⁷ See, for example, *SBC/Ameritech*, 14 FCC Rec at 14854–55 ¶ 349; *BA/NYNEX*, 12 FCC Rec at 19992 ¶ 12, 20069 ¶ 178.

interest harms.”¹⁶⁸ The Chairman told the companies that he had “serious concerns” about whether the merger satisfied the public interest standard. He then informed the companies that “[a]mong the actions which the Commission could take are to set your application for a full hearing or to approve it with conditions.”¹⁶⁹ In effect, the Chairman threatened the parties: craft conditions that satisfy the staff’s concerns or expect a “full hearing” that threatened to drag the merger review process out for several months (if not years) longer, and that would inevitably yield a denial of the merger in the absence of conditions because of the “significant” public interest issues.

Faced with those “options,” the Chairman could readily “assume that [SBC and Ameritech] are interested in pursuing discussions” about conditions.¹⁷⁰ As the companies pointed out in their public interest statement to the Commission, the SBC/Ameritech merger is part of an overall strategy by the two companies to enter thirty new markets outside their respective regions. The merger is critical to their plan, according to the companies, because neither company, on its own, has the resources to expand to the necessary level.¹⁷¹ Thus, as long as the cost of the conditions extracted by the Commission would be less than the cost of having the merger denied and thus having their competitive strategy thwarted, the parties would have agreed to the Commission’s terms. The Commission was well aware of this fact and was bold in its demands. And, as expected, SBC and Ameritech agreed to a multitude of onerous conditions aimed at satisfying the Commission’s regulatory agenda.¹⁷²

It is clear, then, that the Commission takes full advantage of its superior bargaining position in adjudications and extracts sweeping conditions from the parties by threatening to deny the merger outright if the parties do not agree to the Commission’s terms. As current Commissioner Furchtgott-Roth has put it, many of the conditions the Commission extracts even amount to “social issues [that are] beyond [the FCC’s] expertise or authority.”¹⁷³ Another member of the current Commission, Commis-

¹⁶⁸ Kennard Letter at 1 (cited in note 86).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *SBC/Ameritech*, Description of the Transaction, Public Interest Showing and Related Demonstrations, 6–7 (filed with FCC July 24, 1998) [on file with U Chi Legal F].

¹⁷² See *SBC/Ameritech*, Appendix C, 14 FCC Rec at 14964.

¹⁷³ Separate Statement of Commissioner Harold W. Furchtgott-Roth in *MCI/WorldCom*, 13 FCC Rec at 18159. The Commission’s condition negotiation process

sioner Powell, has voiced similar concerns about the Commission's imposition of conditions that it otherwise could not enact in a general rulemaking. He has argued "that the Commission's public interest authority to review transfers of authorizations is not a license to sweep into the review every possible goal that one could argue is supported by or consistent with the statute."¹⁷⁴ In particular, he has cautioned that the Commission should not allow its "public interest authority to degenerate—in reality or impression—into serving as a "back door" to achieve results the Commission is unable (or unwilling) to accomplish more directly, through traditional rulemaking.¹⁷⁵ The Commission, in Commissioner Powell's view, should not "impose merger conditions too easily or make those conditions too excessive," because to do so "thereby substitute[s] regulators' judgments about how communications resources should be allocated for the judgment of consumers and competitors in the marketplace."¹⁷⁶

It is evident from the FCC's merger orders that the agency as a whole does not share this view. Instead, the Commission frequently uses its authority over license transfers and certificates to impose its substantive will on the parties and to require them to run their business as the Commission sees fit. Thus, the Commission effectuates many of its telecommunications goals piecemeal through license adjudications instead of through a rulemaking generally applicable to all similarly situated parties. With virtually every major telecommunications player merging, the Commission can use its authority to condition mergers as a back door mechanism to impose its regulatory agenda. The Commission's analysis of competitive effects in license adjudications inevitably becomes clouded by its desire to get that agenda advanced. The Commission frequently cannot resist the opportunity to advance its policy agenda regardless of whether the proceeding is a rulemaking or an adjudication. As a result, the Department and the Commission follow drastically divergent procedures even though they both proceed under an "adjudication" model.

with SBC and Ameritech led Commissioner Furchtgott-Roth to observe once again that the Commission might not even be able to require some of the conditions it demands "out-right in a rulemaking." Furchtgott/Whitacre Letter (cited in note 20).

¹⁷⁴ Separate Statement of Commissioner Michael K. Powell in *MCI/WorldCom*, 13 FCC Rec at 18166.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

C. Explaining the FCC's Procedural Approach

As we have shown, even in a merger adjudication the Commission proceeds from a decidedly regulatory bias: it seeks to paint with a broad brush and advance a general policy agenda. The Commission's license transfer proceedings blend what the Commission perceives as the advantages of adjudication (flexible standards, limited judicial review, and marginal notice and comment) with its favorite aspects of rulemaking (governing an entire industry with broad pronouncements that reach all aspects of behavior). The Commission frequently extracts onerous conditions from the parties in exchange for merger approval, and those conditions, in turn, read like additional pages of the Federal Register, holding the merging parties to new substantive rules and regulations.

We have already explained why the Commission prefers generally to pass broad edicts: it is a rulemaking agency at heart, reliant on the power of regulation over that of the market. This section explores the specific attractions of furthering broad policies through adjudications instead of rulemakings and discusses some unfortunate consequences of this approach.

1. The irresistible advantages of the adjudication framework.

The Commission's rulemaking approach to license adjudications can hardly be deemed an accident. The Commission knows that advancing its regulatory agenda in these proceedings has enormous advantages over general rulemakings.

a) Freedom to change. Perhaps the greatest attraction to advancing its substantive policy in an adjudication is the freedom it gives the Commission. In adjudications, the Commission can advance its policies in a way that seems entirely fact-specific, which leaves it room to retain its position in the next case or to abandon it at will. Judge Friendly observed this phenomenon in the FCC's treatment of "local interest" as a factor in determining which carrier gets a broadcast license. He noted that the FCC had changed its policy, but that the transformation was

slipped into an opinion in such a way that only careful readers would even know what had happened, without articulation of reasons, and with the prior authorities not overruled, so that the opinion writers remain free to pull

them out of the drawer whenever the agency wishes to reach a result supported by the old rule but not the new.¹⁷⁷

In effect, the agency “disguis[es] its policymaking as factfinding” allowing it to change policies as easily as the facts before it change.¹⁷⁸ Or, as Chief Justice Hughes described “the unscrupulous administrator’s prayer: ‘let me find the facts for the people of my country, and I care little who lays down the general principles.’”¹⁷⁹

This freedom can be especially important as an agency adjusts to a changing regulatory landscape. For example, the 1996 Act fundamentally alters the view of telecommunications. Congress no longer sanctions the view that local markets are natural monopolies; the Act seeks to replace regulation with competition and market forces. In the meantime, the Commission is left to police the transition. In these circumstances, the Commission must appreciate the opportunity to use its merger adjudications as laboratories to test new policies before implementing them on a wider scale. If the conditions it adopts do not yield the expected results, the Commission can abandon them in the next case by relying on the fact that different merging parties are before it. If the conditions succeed, the Commission can continue to require them in future proceedings or even in a broader regulation. If the Commission initially announced its policy through regulations instead of conditions, its power to advance its own agenda would

¹⁷⁷ Friendly, *Federal Administrative Agencies* at 63 (cited in note 60). See also Diver, 95 Harv L Rev at 408–09 (cited in note 137) (summarizing critics of agencies that adopt “incremental” policies resulting in “a paper veneer behind which rank favoritism or obsequiousness could flourish”).

¹⁷⁸ See *Allentown Mack Sales & Service, Inc v NLRB*, 522 US 359, 376 (1998); see also Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 BU L Rev 387, 405 (1995) (“On occasion, the Board manipulates its findings regarding industrial reality in order to mask an out-and-out policy judgment as the mere product of impartial legislative factfinding. That is, rather than acknowledging that a policy is based purely on its judgment as to what constitutes the most desirable industrial course, the Board will instead assert that the policy necessarily follows from its findings of legislative fact.”). As Professor Shapiro has observed, “[t]here are clear indications that when an administrative rule, either substantive or procedural, is embodied in a regulation, a court will be much less willing to sustain an agency’s disregard of that rule, at least in the absence of a satisfactory explanation of why the regulation is not controlling.” Shapiro, 78 Harv L Rev at 951 (cited in note 64).

¹⁷⁹ *NLRB v Curtin Matheson*, 494 US 775, 819 (1990) (Scalia dissenting) (citation and quotation omitted). See also Seidenfeld, 51 Admin L Rev at 467 (cited in note 50) (noting that the APA allows agency heads to reverse the facts found as well as the ultimate decision of an ALJ precisely because “much policy is set via adjudicatory decisions and . . . fact-finding can affect the implementation of policy”); id at 468 (“[A]n agency may couch a change of policy as a modification of factual presumptions or burdens of proof to alter outcomes.”).

be far more limited. The Commission would formally have to abandon its prior rule with sound reasoning, instead of trying to distinguish its way around a prior case.

b) *Freedom from interference.* Second, and relatedly, imposing its will through conditions in an adjudication effectively shields the Commission's new rules from judicial review and congressional oversight. By keeping its policies grounded in what appear to be the facts of a particular merger, the Commission is able to implement policies with far less oversight.

The option of "voluntary conditions" is especially likely to shield the agencies policies from judicial review. That is, the imposition of policies via conditions on a particular merger is unlikely to get to the judicial review stage because the parties themselves are frequently in no position to challenge the Commission's order. The parties, at least on the surface, "voluntarily" agree to proposed conditions in order to obtain rapid approval of their merger. In today's competitive environment, the ability to merge quickly is often tantamount to the ability to compete. Rather than face an outright denial of their application from the Commission and a lengthy judicial review process,¹⁸⁰ merging parties will accede to the Commission's conditions by "proposing" the conditions themselves, even if the parties believe them to be unlawful.¹⁸¹

The main reason the parties agree to the Commission's terms is to close their deal quickly. As the D.C. Circuit has observed, "[i]n this dynamic and technologically innovative industry, a proposed venture may become obsolete in just a few years."¹⁸² Thus, "[t]o delay a project six months will increase capital cost and diminish technological advantage; to delay it a year or more may destroy its attractiveness as an investment."¹⁸³ Similarly, once the

¹⁸⁰ See *United States v FCC*, 652 F2d 72, 91 (DC Cir 1980) ("The sad truth about agency decisionmaking and evidentiary inquiries is that they take time; and time often works to the advantage of one party over another.").

¹⁸¹ See Furchtgott-Roth, *The FCC Racket*, Wall St J at A18 (cited in note 113) (Merging parties "do not publicly complain too much because that would annoy the FCC, which has ultimate regulatory control over their business, both today and tomorrow. They do not go to court, out of fear that the corresponding delay will sink this and future deals. They cannot allow anything—no matter how arbitrary and demanding—to threaten their mergers."); see also Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part) *SBC/Ameritech*, 14 FCC Rec at 15198 ("[T]he coercive effect of having the applicants over a barrel hoping to gain merger approval dramatically improves the chances that the companies will 'agree' to abide by the conditions.").

¹⁸² *United States v FCC*, 652 F2d at 95.

¹⁸³ *Id.*

party receives the license or certificate, it generally has no interest in obtaining judicial review of the voluntary nature of the bargain struck with the agency because it is not worth the uncertainty and delay—and the Commission may then deny the application if the conditions no longer hold.

Thus, the temptation to extract conditions that effectuate the agency's policy is overwhelming: parties will agree to a variety of onerous conditions to get a merger approved, and those "voluntary" commitments are unlikely to be reviewed by a court. As Professor Shapiro puts it, "the 'lifted eyebrow,' backed by a veiled or express threat" that the merger will be denied "can be an effective means of declaring and applying a given policy free from the restraints of judicial review."¹⁸⁴ The Commission recognizes the vulnerability of the merging parties and seizes upon its superior bargaining position as an opportunity to further its substantive goals.

Moreover, even if a court reviews the agency's imposition of conditions or policies, the agency is more likely to survive a judicial challenge than if it implemented those policies broadly in a rulemaking.¹⁸⁵ "An agency that declares and applies a rule in the course of an adjudication often has two strings to its bow on judicial review."¹⁸⁶ That is, a reviewing court could affirm the policy outright or it could doubt the legality of the policy as a general matter but affirm the result in the particular case on the ground that the result in that case was proper.¹⁸⁷

Furthermore, if an agency's policy "is not the one set forth in its opinion but rather amounts to the sum of that policy's application in innumerable cases"—which is true of the Commission's application of the "public interest" test in its merger orders—"the court will not only be precluded from passing on the validity of the policy, but will most likely dispose of the appeal without ever knowing the substance of the actual policy."¹⁸⁸ The parties, if they challenge the conditions at all, are likely to challenge only the application of the public interest test to their particular case and

¹⁸⁴ Shapiro, 78 Harv L Rev at 923 (cited in note 64).

¹⁸⁵ See, for example, Flynn, 75 BU L Rev at 422 (cited in note 178) (noting that the NLRB's "hide-the-ball methodology has been a success in maximizing the agency's policy-making autonomy").

¹⁸⁶ Shapiro, 78 Harv L Rev at 944 (cited in note 64).

¹⁸⁷ Id at 944–45; see also Flynn, 75 BU L Rev at 413 (cited in note 178) (noting that, when an agency hides its policies in factual findings instead of a stated standard, a court is "focused at all times on the policy's application to a particular set of facts rather than on the substance of the policy itself").

¹⁸⁸ Flynn, 75 BU L Rev at 414 (cited in note 178).

not raise a broader indictment against the Commission. And Congress is similarly hindered in trying to evaluate the agency's policy when it is implemented in this fashion; thus Congress cannot exercise effective oversight.¹⁸⁹

Agencies are well aware that they face far less scrutiny when they proceed with a policy through case-by-case adjudication than when they proceed through rulemaking. The National Labor Relations Board, for instance, proceeds almost exclusively by adjudication to avoid trapping itself behind the bright lines of a rule.¹⁹⁰ Of course, as the Supreme Court recently observed, "a[n] agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as fact-finding."¹⁹¹ But it is easier to state the principle than to police it. Indeed, in the very case in which the Court announced this principle, four Justices disagreed that the agency engaged in the sort of policy determination of which it was accused.¹⁹²

The Commission's behavior, then, is not an example of a diabolical agency run amok. Rather, it is the logical outgrowth of an agency seeking to expand its regulatory agenda, presumably with the benign motive of advancing what it perceives as positive social policies.¹⁹³ An adjudication offers a forum in which the Commission can insulate those policies from review and preserve its own power.

¹⁸⁹ Friendly, *Federal Administrative Agencies* at 6 (cited in note 60) ("[F]ailure by the agency to make clear what it is doing impedes both executive challenge and legislative response.").

¹⁹⁰ See *Allentown Mack*, 522 US at 374 ("The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking."); Flynn, 75 BU L Rev at 399 (cited in note 178) (arguing that the NLRB engages in policymaking through adjudication as "a means of furthering particular policy goals without attracting unwanted attention from the other branches of government").

¹⁹¹ *Allentown Mack*, 522 US at 376.

¹⁹² *Id.* at 379-87 (Breyer concurring in part and dissenting in part). Similarly, in *NLRB v. Curtin Matheson*, although a majority of the Supreme Court concluded that the Board could refuse to adopt a "presumption that striker replacements oppose a union," three dissenters argued that the Commission was disguising its policymaking as factfinding. 494 US at 819 (Scalia dissenting).

¹⁹³ See Flynn, 75 BU L Rev at 445 (cited in note 178) (arguing that the NLRB's "use of veiled policymaking . . . appears in many instances to be directed not simply toward protecting the Board's turf and maximizing the agency's power at the expense of the courts, but also toward protecting important statutory goals from the substantial possibility of judicial obstruction").

2. The inevitable and unfortunate consequences.

Although the agency apparently believes it advances the social good by doing so, it sacrifices the democratic values of our system of government when it mixes and matches aspects of the procedural models at will and seeks to evade review. With no judicial review or congressional oversight, an unaccountable agency can advance policies that may be completely at odds with the legislation under which it acts.¹⁹⁴ Limiting notice and comment, moreover, essentially cuts off the dialogue with regulated and interested parties, leaving the agency to shape policy in a vacuum.¹⁹⁵ This approach results in the worst of all possible worlds from a rule-of-law perspective:¹⁹⁶ an agency with the power to imbed common law norms as binding rules, with virtually no oversight by interested parties or reviewing bodies. In this section, we explore in greater detail the dangers of a hybrid approach that seeks to advance a broad policy agenda in an adjudication in which the public is not allowed to participate effectively.

First, the hybrid approach is less likely than a rulemaking to produce a substantively sound policy. To be sure, “[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.”¹⁹⁷ But the procedural framework of an adjudication is ill-suited for this role. An adjudication generally involves input from only the parties to the particular conflict; these parties offer a limited perspective on an issue and can supply a relatively modest amount of data to inform the inquiry. For example, only the merging parties have notice of all the issues of concern to the Commission—and only they can comment when it matters most.¹⁹⁸ The condi-

¹⁹⁴ An evaluation of the substantive merit of the conditions the Commission has extracted in merger proceedings is beyond the scope of this Article. But it does appear that the volume and scope of conditions is at least in tension with the 1996 Act's deregulatory, market-based goals.

¹⁹⁵ This compromises civic republican values. “Representatives of all interests potentially affected by a government action must have meaningful opportunities to engage in discussion about the action.” Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv L Rev 1511, 1530 (1992). For a general discussion, see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L J 1539 (1988).

¹⁹⁶ “Rule of law” can mean many things, of course. For a general discussion, see Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum L Rev 1 (1997). Here, we refer to its core purposes of allowing parties “to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions” and its “guarantee against some types of official arbitrariness.” Id at 7–8.

¹⁹⁷ *NLRB v Wyman-Gordon Co*, 394 US 759, 765 (1969).

¹⁹⁸ See, for example, Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, *SBC/Ameritech*, 14 FCC Rec at 15200 (“I am of the view that

tions imposed on a license transfer application—in contrast to regulations announced in a rulemaking—do not permit interested parties sufficient opportunity for notice and comment. Some conditions are implemented without any notice and comment—they are the result of private negotiations between the Commission and the merging parties.¹⁹⁹

Even if the Commission allows for notice and comment on proposed conditions,²⁰⁰ the reality of the Commission's merger review process makes this notice and comment less effective than it is in the context of a rulemaking. That is so primarily because the conditions are only released to the general public *after* the Commission staff and the merging parties hammer out all the details in lengthy, private negotiating sessions.²⁰¹ For example, the SBC and Ameritech merger conditions proposed for comment were the result of months of bargaining between the merging parties and the Commission staff²⁰² in meetings that were not open to the public.²⁰³ Because the Commission staff had already invested a great deal of time and effort in the conditions put forth and because the final package represented an interrelated series

this inherently bilateral [merger review] process does not and cannot take sufficient account of the issues that might be raised by third parties.”).

¹⁹⁹ See Hetke/Mancini Letter at 1 (cited in note 93).

²⁰⁰ The Commission adopted this approach in the SBC and Ameritech merger. See *SBC/Ameritech*, 14 FCC Rec at 14855 ¶ 351.

²⁰¹ Commissioner Furchtgott-Roth has objected to the manner by which the parties and the Commission staff craft conditions:

It is unclear to me why certain parties should be permitted to create an additional, private record before the Commission We should either reopen the comment period, or close the record and proceed to a final decision by Commission vote and order. Assuming that the imposition of conditions is permissible . . . I fail to see why the Commission would need to consult the parties to determine whether it “would be possible to craft conditions” that would allay any public interest concerns we might have. Surely the Commission knows how to do so on its own.

Furchtgott/Whitacre Letter at 3 (cited in note 20), quoting Kennard Letter (cited in note 86).

²⁰² See *SBC/Ameritech*, 14 FCC Rec at 14855 ¶ 351.

²⁰³ See Furchtgott-Roth, *The FCC Racket*, Wall St J A18 (cited in note 113). Commissioner Furchtgott-Roth has described the process thus:

Commission staffers engage in months of secret negotiations without a clear written record of what is being negotiated or why. The FCC issues public pronouncements about open processes, and yet denies anyone from the public access to, or minutes from, the secret meetings. Then, remarkably, a complex and detailed set of ‘voluntary’ promises are submitted to the FCC for approval. Like puffs of smoke from the Vatican, it is a sign: The deed is done.”

of compromises, one can assume that commenting parties operated at a disadvantage when they argued against a particular condition or when they sought additional concessions. And, in fact, according to Commissioner Furchtgott-Roth, "not a single substantive change to the [SBC/Ameritech] conditions was made after public comment."²⁰⁴ The Commission is far more likely to be flexible and open-minded when it publishes a notice of proposed rulemaking and has less invested.²⁰⁵

Inevitably, the Commission's substantive policies suffer when different voices and views are stifled or unnoticed.²⁰⁶ In contrast, a rulemaking allows all interested parties to comment,²⁰⁷ which is likely to yield a broader range of perspectives and a greater supply of information.²⁰⁸ Thus, the agency is far better informed to make a general pronouncement in the latter situation than in the former.²⁰⁹

In addition, as with all adjudications, commenting parties in an FCC merger proceeding are necessarily limited by the facts of the particular license transfer application and may not see the larger ramifications when the Commission's policies are presented in this format.²¹⁰ Indeed, some parties affected by the Commission's new policy might not even realize that the Com-

²⁰⁴ *Id.*

²⁰⁵ To be sure, an agency's proposal in a rulemaking shares some of these same characteristics. The staff reaches a proposed solution and is certainly inclined to adopt it even before the public submits its comments. But the dynamic is far different when the agency reaches its proposed solution after long and detailed negotiations—and when a deal with the merging parties rests on adoption of those conditions. The agency has more invested in the latter circumstance, and commenters therefore face a much higher hurdle when trying to get the agency to change its mind.

²⁰⁶ See *Wyman-Gordon*, 394 US at 777–78 (Douglas dissenting) (noting that the notice and comment process in a rulemaking helps the agency to "learn from the suggestions of outsiders and often benefit from that advice").

²⁰⁷ Ginnane, 95 U Pa L Rev at 628 (cited in note 142) ("The *rule making* provisions of [the APA] are designed to provide for public participation in the making of substantive rules by federal agencies.").

²⁰⁸ See Bernstein, 79 Yale L J at 591 (cited in note 137) ("[N]otice, carried by specialized publications to those who are potentially affected, sets in motion the processes of private groups who will seek to advance their own policy by mobilizing their sources of information and experience and making them available to the agency."); *id.* at 596 (noting that "[a]ny limitation upon participation excludes potentially relevant experience, which in an economy as vast, complex, and varied as ours, should be known as completely as possible before an agency promulgates a policy" and observing that "a rule making requirement assumes that litigants in individual cases do not represent the full range of possible fact situations and arguments potentially involved in a prospective rule").

²⁰⁹ See *id.* at 588.

²¹⁰ Shapiro, 78 Harv L Rev at 938–40 (cited in note 64).

mission is establishing a benchmark or changing course in a manner that will affect them later.²¹¹

There is, moreover, the danger that dominant factors in particular cases will skew an agency's policy in an unintended manner.²¹² It is possible that the facts of a particular case will mask a broader question that goes to the true heart of a policy matter.²¹³ In addition, when an agency makes policies in adjudications, its determinations may not follow a coherent order; when an issue arises depends entirely on when parties come to the agency. Thus, the agency may find itself reviewing a series of interrelated issues in piecemeal fashion, and the substantive results may be at odds with one another. In a rulemaking, the agency can determine what issues to consider and when, so it can evaluate all interrelated questions in one action and decide them in concert.²¹⁴ The agency can also calibrate which aspects of an issue are more important if tradeoffs are necessary.

Second, a rulemaking is more likely than a hybrid adjudication to produce a clear statement of policy. It is difficult to determine the precise policy of an agency when it is buried in an adjudication involving singular facts and circumstances. In contrast, a rule promulgated in a rulemaking will generally be published in the Federal Register and, necessarily be written in a manner that is divorced from individualized facts.²¹⁵ This clarity generally makes the rule more effective. Individuals will know the content of the rule and can adjust their behavior accordingly, as opposed to testing the bounds of a seemingly fact-specific determination contained in an adjudication.²¹⁶ The greater certainty also allows regulated individuals and entities to invest in productive enterprises without fear that the conduct will violate a vague pro-

²¹¹ *Id.* at 940 ("[T]he enunciation of rules in adjudicatory proceedings frequently has the effect of 'hiding the ball' from those who are not initiated into the mysteries of a particular agency and its works.").

²¹² *Id.*

²¹³ See Shapiro, 78 *Harv L Rev* at 937-40 (cited in note 64) (discussing an example from the FTC and concluding that "[i]f an important or novel question is suggested by an adjudication, especially one not necessary to a decision, an effort to resolve it may end by submerging the actual controversy and delaying its conclusion unduly, while at the same time improperly coloring the larger issue and thwarting fully informed and objective consideration").

²¹⁴ *Id.*; see also Bernstein, 79 *Yale L J* at 590-91 (cited in note 137).

²¹⁵ See Shapiro, 78 *Harv L Rev* at 941 (cited in note 64) (observing that promulgated regulations "can serve the function of readily accessible codification").

²¹⁶ See Bernstein, 79 *Yale L J* at 590 (cited in note 137) ("Clearly enunciated and properly drawn rules should reduce litigation by authoritatively advising the regulated what may, must, or must not be done.").

nouncement in an adjudication. This clarity also facilitates enforcement.

An adjudication or hybrid proceeding lends itself to greater uncertainty because the agency is not forced to enunciate a principle of governance; instead, the agency can take an incremental approach and leave itself room to alter its policy.²¹⁷ For example, the Commission's erratic application of the "public interest" test makes it virtually impossible for even the merging parties to know *ex ante* which aspects of the transaction will concern the Commission. Although the Commission focuses on competitive effects, its analysis of competitive effects includes virtually anything of concern to the Commission, from regulatory benchmarks to universal service. "The effect of many standards, however, is virtually the same as having none at all. There is no clear indication of which standards are more important, how they are to be individually applied, or how varying degrees of conformity are to be balanced."²¹⁸

In addition, the Commission's analysis of potential competition is wholly speculative—no one can know what the future holds, so it is impossible to determine what the Commission will predict. This uncertainty helps account for the fact that some mergers are subjected to long delays, while others have been rapidly reviewed and approved by the Commission.²¹⁹ Unfortunately, it is entirely unclear *ex ante* which transactions will get this favorable treatment.²²⁰ For parties planning complicated

²¹⁷ See Diver, 95 Harv L Rev at 403 (cited in note 137). Judge Friendly has described several instances where an agency's failure to take steps to define and clarify a broad statutory standard in an adjudication has led to unpredictability and incomprehensibility. For a general discussion, see Friendly, *Federal Administrative Agencies* (cited in note 60). Judge Friendly notes that an agency could remedy this lack of coherence by various methods, including rulemaking. See *id.* at 142–46.

²¹⁸ Breyer, *Regulation and Its Reform* at 79 (cited in note 64). We frequently use the term "rules" throughout this Article, but our analysis could apply to "standards" as well. That is, whether an agency adopts a bright-line rule or a flexible standard, its policy determination is likely to be more comprehensible in a rulemaking than an adjudication (or hybrid proceeding). There is, of course, a heated debate among scholars about the merits of rules versus standards. See, for example, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989). That debate, however, is beyond the scope of this Article.

²¹⁹ See, for example, *Applications of Bourbeuse Telephone Company and Fidelity Telephone Company for Consent to Assignment of Authority Under Section 214 of the Communications Act*, Memorandum Opinion and Order, CC Dkt 98-210 (Dec 21, 1998).

²²⁰ See, for example, Press Statement of Commissioner Furchtgott-Roth Regarding Proposed SBC/Ameritech Conditions, available online at <<http://www.fcc.gov/Speeches/>

transactions, the uncertainty is frequently as troublesome as delay. If the Commission followed a rulemaking approach, instead of relying on fact-intensive adjudications to further its policies, it is more likely that the Commission would announce clearer rules and standards, which would, in turn, help parties adjust their behavior and make sound business plans.

Third, a rulemaking generally subjects agency policy to greater political and judicial accountability. As to political accountability, rulemakings require notice of the proposed action, giving citizens and government officials advance warning of a proposed course. This enables politically accountable executive and congressional officials to exert influence over the agency.²²¹ If an agency makes a policy determination in an adjudication, there might not be such advance warning, and it may be difficult or impossible for political officials to weigh in.

As to judicial accountability, a rule announced in a rulemaking is far more likely to be susceptible to judicial review. As noted, a policy announced in a rulemaking is more likely to lead to a clearer articulation of the agency's position than a policy announced in an adjudication; it is often quite difficult to discern agency policy when announced in an adjudication because it intermingles with facts, and it is frequently difficult to determine how those facts and circumstances were weighed by the agency.²²² Thus, the easiest way for an agency to avoid the fallout from an unpopular decision or to further its regulatory agenda even when it conflicts with congressional intent or its enabling statute is to

Furchtgott_Roth/Statements/sthfr926.html> (visited Jan 22, 2000) ("The Commission routinely grants tens of thousands of license transfers annually, holds some up for a low degree of scrutiny, and holds a few up for close scrutiny, all without clear and written rules about which transfers fall in which category"); see also Separate Statement of Commissioner Furchtgott-Roth in *AT&T/TCI*, 14 FCC Rec at 3240 ("[M]erging parties have no clear notice as to the threshold showing for determining the scale of FCC license transfer review when mergers are involved. Apparently, only the Commission knows a facially clear case for review when it sees one, and it is unwilling to say what such a case looks like.").

²²¹ See Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L Econ & Org 243 (1987); see also Bernstein, 79 Yale L J at 598 (cited in note 137).

²²² See Flynn, 75 BU L Rev at 404 (1995) (cited in note 178) (noting that the NLRB's practice of making policy in the course of adjudications and its "practice of hiding behind multifactor tests instead of acknowledging well-defined rules of decision makes judicial review of its policymaking much more difficult"); Bernstein, 79 Yale L J at 590 (cited in note 137) (asserting that agency policy announced in adjudicatory decisions can yield a "diffuse, overly subtle mosaic of [agency] doctrine"); Friendly, *Federal Administrative Agencies* at 103-04 (cited in note 60) (describing the Civil Aeronautics Board's refusal to discuss how it weighed various facts and pointing out that "such an undifferentiated list of criteria leaves the agency free to decide any case any way it wishes").

bury that policy in individual cases. The Commission's approach to merger reviews is Exhibit A of this phenomenon. Its merger conditions seem fact-specific, but they are actually much broader statements of agency policy that evade judicial review.

Fourth, rulemaking is generally a more efficient method of policymaking. It is far more cumbersome to extract and present legislative facts in an adjudication via witnesses and in compliance with various other evidentiary rules; in a rulemaking, the information may be presented in its most direct form.²²³ Moreover, an agency's articulation of a rule in a rulemaking is binding on a broad class of individuals, thereby eliminating the need to relitigate the same issues.²²⁴ This saves time and limited agency resources. Indeed, it allows agency personnel to concentrate their efforts on major policy determinations without getting bogged down in the factual peculiarities of individual cases.²²⁵

The Commission's merger review process shows how long and cumbersome it can be for an agency to use an adjudication as a forum for making larger policies. And even though the Commission often pursues the same agenda, it must renegotiate the conditions each time. For example, the conditions in SBC/Ameritech and Bell Atlantic/GTE overlap in many respects, but both proceedings involved lengthy negotiations because Bell Atlantic and GTE were not, strictly speaking, bound by the Commission's prior order conditionally approving the SBC/Ameritech merger.

Fifth, a hybrid approach risks the inequitable treatment of regulated parties—and therefore raises fundamental questions of fairness and administrative due process. An agency pronouncement in an adjudication governs the parties to that proceeding immediately, but it is unclear when and whether the agency's policy will be applied to others. A rulemaking, in contrast, applies to a broad class of individuals simultaneously.²²⁶

The Commission's merger review proceedings illustrate this dynamic. Not all similarly situated companies merge at the same time. Thus, inevitably, some companies will operate without the burden of a condition even though the rationale for imposing the

²²³ But see Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex L Rev 525, 528, 532–36 (1997) (arguing that the rulemaking process has ossified and noting further that “[t]he rulemaking exercise is often considerably complicated by the absence of information on relevant questions and the corresponding need to draw inferences from existing data”).

²²⁴ See William F. West, *Administrative Rulemaking: Politics and Process* 50 (Greenwood 1985).

²²⁵ See Bernstein, 79 Yale L J at 591–92 (cited in note 137).

²²⁶ Shapiro, 78 Harv L Rev at 935 (cited in note 64).

condition applies to them as well. For example, although other incumbents were in the same position as Bell Atlantic/NYNEX, the Commission did not seek to enact the merger conditions as part of a general rulemaking applicable to all similarly situated incumbents. Similarly, SBC and Ameritech adhered to requirements that, for a time, others did not face.²²⁷ Enacting a rule to address concerns that apply to all incumbent local carriers would treat similarly situated competitors evenhandedly; in contrast, “an order directed to only one permits his competitors to gain an unfair advantage,”²²⁸ at least until the competitors themselves face the Commission’s merger review process.

Finally, a hybrid approach to rulemaking sacrifices democratic participation and the integrity of the agency process. Rulemaking allows broad public participation in shaping the final rule.²²⁹ Democracy suffers when true notice and comment is stifled: “[p]ublic airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism.”²³⁰ As Commissioner Furchtgott-Roth observes, the back door “quid pro quo” nature of the Commission’s merger process—if “you do X, which I may not be able to require outright in a rulemaking, I will grant your license transfer—is damaging to the integrity of this institution.”²³¹

All this is not to say that agencies should use adjudications only to apply and implement existing policies. As the Supreme Court recognized in *SEC v Chenery Corp.*,²³² adjudication has a broad role in the administrative decisional arsenal:

“[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.

²²⁷ See Furchtgott-Roth, *The FCC Racket*, Wall St J A18 (cited at note 115) (“For three years, SBC/Ameritech will be a regulatory Frankenstein, different from every other regulated entity in America.”). The Commission eventually imposed similar conditions on the merger of Bell Atlantic and GTE.

²²⁸ Shapiro, 78 Harv L Rev at 935 (cited in note 64).

²²⁹ Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* 266 (Little, Brown 3d ed 1994).

²³⁰ Wyman-Gordon, 394 US at 778 (Douglas dissenting); but see Davis and Pierce, *Administrative Law Treatise* at 424 (cited in note 229) (pointing out that, although “[p]ublic participation can . . . promote rationality by enlarging the policymaker’s field of vision, his burden of investigation, and disciplining his substantive biases,” it also “can just as easily subordinate to the tyranny of selective self-interest any dispassionate search for utopian solutions”).

²³¹ Furchtgott/Whitacre Letter at 2 (cited in note 20).

²³² *SEC v Chenery Corp.*, 332 US 194, 203 (1947).

Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule."²³³

Moreover, because policies produced in a rulemaking will govern a broad class of behavior and individuals as opposed to an individual set of circumstances, they are necessarily over- and under-inclusive.²³⁴ In the instances outlined by the Court in *Chenery*, rules announced in rulemakings are especially susceptible to sweeping too broadly or narrowly.²³⁵ Adjudications, in contrast, allow for fine-tuning at the margins and can give content to an uncertain landscape until broader, more concrete policies can be formulated.²³⁶

The Commission's hybrid approach, however, does not seem necessitated in all, or even most, cases by any uncertain or rapidly changing regulatory policy.²³⁷ On the contrary, the Commission often seems quite sure of its policies but prefers to implement them without the impediments associated with rulemakings. Under these circumstances, there is little justification for

²³³ *Id.* at 202; see also Shapiro, 78 Harv L Rev at 927–29 (cited in note 64).

²³⁴ "Rules, by their nature, generalize, and most generalizations are less than wholly accurate." Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv L Rev 54, 118 (1997). A rulemaking is more likely to produce a more generalized standard than an adjudication, which is anchored by specific facts. Moreover, a rulemaking is also more susceptible to producing a result closer to the "rule" end of the rule/standard continuum than an adjudication. See Seidenfeld, 51 Admin L Rev at 436 (cited in note 50) ("Rules . . . are by their nature over and under inclusive: They prohibit some conduct that their promulgator would condone and allow other conduct that their promulgator would condemn.").

²³⁵ 332 US at 203.

²³⁶ See Shapiro, 78 Harv L Rev at 927 (cited in note 64) (noting that, in some instances, "it may never be feasible, even after the accumulation of considerable experience, to do more than announce the criteria and give some indication of their relative weight" and further observing that, in still other circumstances, "the accumulation of experience in individual cases is a necessary prelude to any effort to elaborate statutory standards in a manner that deals realistically with actual problems rather than with hypothetical cases that may never arise").

²³⁷ Compare with Diver, 95 Harv L Rev at 431 (cited in note 137). Diver discusses two different models of agency policymaking—the incrementalism model (which loosely parallels the adjudication model we have discussed) and the comprehensive rationalist model (which, to an extent, mirrors our rulemaking paradigm). See *id.* He notes that the comprehensive rationalist model "should be the preferred way to make policy in relative stable environments," "when small errors in policy can cause irreversible or catastrophic harm," and "in those policy regimes involving egregious—and irremediable—misallocations of political power among persons most intimately affected." *Id.* In contrast, incrementalism is a "sensible response to technical uncertainty and political ferment." *Id.*

the Commission's end-run around the rulemaking safeguards.²³⁸ Instead, as the Supreme Court has observed, "rulemaking is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings."²³⁹

CONCLUSION

The Commission's regulatory mindset drives it to a fundamentally different approach to mergers than that of the Department. The Commission presumes that a merger should be blocked unless the parties prove it will promote competition. The Commission will also impose conditions on the transaction that it believes will advance its regulatory policy goals. The Department takes a decidedly more laissez-faire approach. As we have also shown, the differences between the two agencies go beyond the substantive standards. The Commission frequently uses merger adjudications to advance various social policies that it would like to impose broadly on an industry. It generally achieves this end by leveraging its power to deny a merger to extract conditions from merging parties—which, in today's consolidation frenzy, essentially includes most regulated telecommunications players.

In this Article, our goal was not only to describe how an agency's ultimate view of governance influences its substantive choices, but also to demonstrate the power of this view on the agency's procedural choices. The Commission's approach to telecommunications mergers shows the powerful effect a regulatory bias can have on both substance and process—and how the two interact to achieve the agency's goals.

We have also offered a criticism of the Commission's approach. But while we believe the Commission's view of "competitive effects" is difficult to square with market dynamics, we do

²³⁸ See Bernstein, 79 Yale L J at 617 (cited in note 137) ("An underlying premise of the APA is that an agency should consult those whom it regulates, since the latter often possess information, experience and expertise pertinent to wisely constructed rules"); *Wyman-Gordon*, 394 US at 764 ("The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application.") (citing H Rep No 1980, 79th Cong, 2d Sess, 21–26 (1946); S Rep No 752, 79th Cong, 1st Sess, 13–16 (1945)); *Wyman-Gordon*, 394 US at 771 (Black concurring) ("It was evidently contemplated [by Congress] that administrative agencies like the Labor Board would follow [the APA's rulemaking procedures] when setting to announce a new rule of law to govern parties in the future."). See also Friendly, *Federal Administrative Agencies* at 146–47 (cited in note 60); Davis and Pierce, *Administrative Law Treatise* at § 6.7 265–66 (cited in note 229); Shapiro, 78 Harv L Rev at 942 (cited in note 64); Ginnane, 95 U Pa L Rev at 623 (cited in note 142).

²³⁹ *Community Television of Southern California v Gottfried*, 459 US 498, 511 (1983).

not mean to suggest that the policies it ultimately advances under that heading are otherwise improper. That is, while we observe that the Commission has forced a variety of unrelated policies into a "competition" box to allow it to extract conditions in merger proceedings, we do not mean to express an opinion on the underlying merit of the various policies it has sought to implement in these proceedings. What we do argue, however, is that, to the extent the Commission wants to improve the available options for consumers in underserved areas, further the deployment of advanced services, or advance any other policy agenda, it should do so openly and directly, in general rulemaking proceedings. As we have attempted to show, the Commission's use of merger proceedings to achieve the same ends distorts the "competition" analysis and tends to short-circuit fundamental processes that ensure proper participation by interested parties and that allow the judiciary and Congress to exercise proper oversight.

While we understand the agency's impulses to take this approach, at bottom, there is no need for the Commission to further its regulatory agenda through license adjudications. The Commission already has the authority to regulate the merging parties directly. There is no reason to doubt that the Commission could require the merged entity to comply with all of its legally valid substantive rules just as effectively as it could require the single companies that make up the merged entity to comply with the merger conditions. Of course, if the merger itself would result in a violation of the Commission's rules—for example, if the merger would bring the combined entity over subscriber limits or would result in unlawful wireless overlaps—the Commission could refuse to grant the necessary license or certificate until the merged company is in compliance. The Commission could also condition the license or certificate on compliance with its rules. But the Commission need not go beyond the particular license transfer before it.²⁴⁰

²⁴⁰ As discussed in note 20, there is a substantial difference between reviewing a particular license transfer and reviewing an entire merger "writ large." See Separate Statement of Commissioner Harold Furchtgott-Roth, *AT&T/TCI*, 14 FCC Rec at 3238 ("To be sure, the transfer of the licenses and authorizations is an important part of the merger. But it is simply not the same thing. The merger is a much larger and more complicated set of events than the transfer of FCC permits."). In addition, it should be noted that DOJ review may frequently obviate the violation of the Commission's rules. For example, AT&T's merger with TCI would have resulted—if approved unconditionally—in a violation of the Commission's spectrum cap rules. DOJ entered a settlement agreement with AT&T and TCI that requires the companies to transfer the stock that results in the spectrum cap violations to a trust administered by an independent trustee. See *AT&T/TCI*, 14 FCC Rec at 3208–09 ¶ 100. The Commission ultimately imposed the same condition on its approval

As for the Commission's broad social agenda that transcends the particular merger before it, that is precisely what its rule-making power is designed to address. As Justice Douglas observed, "Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action."²⁴¹

of the merger. See *id.* at 3210–13 ¶¶ 106–12. But DOJ's settlement agreement alone would have remedied the lack of compliance with the Commission's rules.

²⁴¹ *Wyman-Gordon*, 394 US at 779 (Douglas dissenting).

